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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 624

SAMUEL A. PARSONS, TOWN CLERK OF THE TOWN OF HUBBARDTON, ET AL., APPELLANTS,

vs.

T. GARRY BUCKLEY, ET AL.

No. 625

PHILIP H. HOFF, GOVERNOR OF VERMONT, ET AL., APPELLANTS,

vs.

T. GARRY BUCKLEY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

FILED OCTOBER 26, 1964

PROBABLE JURISDICTION NOTED DECEMBER 14, 1964

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

T. Garry Buckley, Janette N. Berry and Milton L. Hard, Petitioners,

vs.

Philip H. Hoff, Governor of Vermont, et al., Respondents.

Plaintiffs' Amended Complaint—Filed April 23, 1963

Pursuant to leave of Court, duly requested and granted by the Honorable Court in the above entitled cause, the plaintiffs amend their complaint filed so that said complaint will read as follows:

"The petition of T. Garry Buckley of Bennington, Vermont, Janette N. Berry of Brattleboro, Vermont and Milton L. Hard of Burlington, Vermont, respectfully represents:

1. This cause of action arises under the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States; 42 U.S.C. § 1983, 42 U.S.C. § 1988, 28 U.S.C. § 1343 and 28 U.S.C. § 2201.

2. This action is brought on behalf of the petitioners, T. Garry Buckley, Janette N. Berry and Milton L. Hard, and all other persons similarly situated.

3. T. Garry Buckley is a resident of Mt. Anthony Road, Bennington, Vermont; Janette N. Berry is a resident of Sunny Acres, Brattleboro, Vermont and Milton L. Hard is a resident of Adams Street, Burlington, Vermont and that the above petitioners are duly qualified voters and taxpayers of the State of Vermont.

[fol. 2] 4. His Excellency, Philip H. Hoff, is Governor of the State of Vermont and under Title 17 of the Vermont Statutes Annotated, is the person to whom various notices

by the Canvassing Board are required to be given and is the Chief Executive of the State of Vermont with such responsibilities as set forth under Title 17 of the Vermont Statutes Annotated, with respect to elections and as the Chief Executive Officer, he has the power to call the General Assembly of the State of Vermont into Special Session.

5. The defendant, Howard Armstrong, is the Secretary of the State of Vermont, residing in Montpelier, Vermont and has been duly elected and qualified as Secretary of State. Under said Title 17, § 1422 of the Vermont Statutes Annotated, he is a member of the Board to Canvass the certificates of votes as therein provided with such additional duties and responsibilities as set forth in Title 17 § 1422 of the Vermont Statutes Annotated.

6. The defendant, Samuel A. Parsons, is Town Clerk of the Town of Hubbardton, in the County of Rutland and as such responsible for the supervision of all elections for town representative to the State Legislature. Under the law he is responsible for the posting of sample ballots before election, and the furnishing of ballots to the voters in Hubbardton for the office of Town Representative. The said Samuel A. Parsons is named defendant as Town Clerk representing the town clerks as a class throughout the State, all of whom are similarly situated.

7. The defendant, Virginia L'Ecuyer, is County Clerk of Grand Isle County and as such, under the law, having responsibilities for the election of State Senators to the Legislature. She is joined as a party defendant representing the County Clerks as a class throughout the State all of whom are similarly situated.

8. The defendants, Philip H. Hoff and Howard Armstrong, individually, collectively and in an advisory capacity, are charged with the following duties:

(a) Preparing and making applications to be submitted by voters for ballot.

(b) The printing and furnishing of ballots to the respective counties and towns.

[fol. 3] (c) Issuing instructions to Town Clerks and local election officials.

(d) Supplying instructions and assistance to town officers and officials.

9. By virtue of the provisions of Chapter II § 6 of the Constitution of the State of Vermont, the Legislative power of the State of Vermont is vested in "The General Assembly of the State of Vermont" consisting of a Senate and House of Representatives.

10. That under Chapter I Article 8 of the Constitution of the State of Vermont, all elections ought to be free and without corruption and that all freemen, having sufficient, evident, common interest with, and attachment to the community, have a right to elect officers and that under Chapter II § 2 of the Constitution of the State of Vermont, the Supreme Legislative power shall be exercised by the Senate and a House of Representatives.

11. Under Chapter II § 13 of the Constitution of the State of Vermont, is it provided that the freemen of each inhabited town in this state may hold elections therein and choose each, one representative to represent said Town in the House of Representatives.

12. That by virtue of the provisions of Chapter II § 18 of the Constitution of the State of Vermont, the Senate shall be comprised of thirty Senators to be freemen of the county for which they are elected, and the Senate shall be apportioned to the several counties, according to the population as ascertained by the census taken regard being always had, in such apportionment, to the counties having the largest fraction and each county being given at least one Senator. Said Chapter II § 18 also provides that a new apportionment of the Senators shall be made to the several counties, after the taking of every census of the United States or after a census is taken under the authority of the State for the purpose of apportionment.

13. Under § 36 of Chapter II of the Constitution of the [fol. 4] State of Vermont it is provided that the House of

Representatives of the freemen of the State, which consists of persons most noted for wisdom and virtue, to be chosen by ballot of the freemen of every town in the State on the first Tuesday next after the first Monday of November, and under § 37 of said Chapter II, it is provided that the voters of the county shall biennially give their votes for Senators apportioned to the county; and that under § 38 of said Chapter II, the term of office of the Senators and Town Representatives shall be two years.

14. The Constitution of the State of Vermont is divided into two Chapters—Chapter I consisting of twenty-one articles, which original Constitution was adopted by the people of the State of Vermont on July 9, 1793 from two basic constitutions of 1777 and 1786; that Chapter II of the Constitution of the State of Vermont is divided into seventy Sections and is a revision of Chapter II of the original Constitution of the State of Vermont, which revision was ratified and approved by the people of this State on the 4th day of March, A.D. 1913 as appears by the Proclamation of the Governor of the State of Vermont, April 8, A.D. 1913.

15. That Chapter II § 7 of the original Constitution of the State of Vermont, adopted in 1793 provided that the freemen of Vermont, in order to enjoy the benefits of election as equally as may be, each town that consists or may consist of eighty taxable inhabitants within one septenary or seven years after the establishing of the Constitution, may hold elections therein, and choose each two representatives and each other inhabited town in this State may, in like manner choose one representative to represent them in the General Assembly during the said Septenary or seven years and after that each inhabited town may, in like manner, hold such elections and choose one representative forever thereafter.

16. That the original Constitution of the State of Vermont in force at the time Vermont was admitted as the Fourteenth State of the United States in 1791, based upon its then provision and its then population, furnished to the people of Vermont equality in the State Legislature giving [fol. 5] greater representation to larger towns over the small towns.

17. That the Fourteenth Amendment to the Constitution of the United States of America was adopted at various times by the States of the Union and by the Fourteenth Amendment to the Constitution of the United States of America, which became valid June 28, 1868, the State of Vermont relinquished whatever right it originally had to a form of representation in the Vermont legislature as originally set forth in the Constitution of the State of Vermont of 1793 and that the subsequent amendment to the Constitution of the State of Vermont, adopted as hereinbefore alleged on March 4, 1913 and that the provision dealing with the allocation for one representative from each town to the Vermont House of Representatives, as adopted by the 1913 Revision to the Constitution of the State of Vermont, was in violation of equality provisions of the Fourteenth Amendment to the Constitution of the United States of America which had been previously adopted and became valid on June 28, 1868.

18. That there are now, in the State of Vermont, two hundred and forty-six towns each having one Representative to the Vermont House of Representatives and that the Senate of the State of Vermont is now apportioned as follows:

Name of County	Senators	Population
Addison	2	20,076
Bennington	2	25,091
Caledonia	2	22,853
Chittenden	5	74,425
Essex	1	6,064
Franklin	2	29,474
Grand Isle	1	2,927
Lamoille	1	11,027
Orange	1	16,014
Orleans	2	20,217
Rutland	3	46,719
Washington	3	42,860
Windham	2	29,776
Windsor	3	42,483

That the apportionment of the Vermont Senate as hereinbefore alleged arises out of the Apportionment Bill adopted by the General Assembly of the State of Vermont on the 9th day of August, 1962 which apportionment of the Senate resulted following the opinions of the Supreme [fol. 6] Court of the State of Vermont in William E. Mikell vs. Robert J. Rousseau, Alma F. Sherwin, Bertha V. Miles and George N. Harmon.

19. That at the time of the adoption of the original Constitution of the State of Vermont in 1793, the population of the State of Vermont was approximately 85,341 people who resided in the various towns and counties as set forth in Appendix A which is attached hereto and made a part hereof.

20. That at the time of the Apportionment of the Senate of the State of Vermont, which was adopted by the General Assembly of the State of Vermont on the 9th day of August, 1962, the population of the State of Vermont as to Towns and Counties is shown as appears in Appendix B which is attached hereto and made a part hereof.

21. That the City of Burlington with a population of 35,531 people, the City of Rutland with a population of 18,325 people, the City of Barre with a population of 10,387 people, the Town of Bennington with a population of 13,002 people and the Town of Brattleboro with a population of 11,734 for a total population of 88,979 have only five Representatives in the Vermont Legislature and that the Town of Stratton with a population of 24 people, the Town of Hubbardton with a population of 238 people, the Town of Goshen with a population of 76 people, the Town of Granby with a population of 56 people and the Town of Victory with a population of 46 people, for a total population of 440 people have an equal voice in the House of Representatives of the State of Vermont with the said Burlington, Rutland, Barre, Bennington and Brattleboro. That the Constitution of the State of Vermont providing for one Representative to the House of Representatives from each town, results in a gross imbalance and substantial inequality between the citizens of the various towns and constitutes an insidious discrimination as to the free-

men of the cities and towns of Burlington, Rutland, Barre, Bennington and Brattleboro and other large towns of the State of Vermont as shown by the exhibits attached hereto and made a part hereof.

[fol. 7] 22. That under said Chapter II § 6 of the Constitution of the State of Vermont as hereinbefore alleged, the General Assembly of the State of Vermont may grant charters, constitute towns, boroughs and cities as well as to provide under the general powers of the Constitution of the State of Vermont for the administration of the affairs of unorganized towns and gores and that following the adoption of the Fourteenth Amendment to the Constitution of the United States, the General Assembly of the State of Vermont has failed under Chapter II § 6 of the Constitution of the State of Vermont, to properly classify unorganized towns and gores so that these areas of the State would not each have a representative to the House of Representatives of the State of Vermont, which results in inequality of representation and is in violation of the provision and spirit of the Fourteenth Amendment to the Constitution of the United States of America.

23. That the General Assembly of the State of Vermont has failed to provide that towns with less than a certain population should be designated and denominated as townships, unorganized towns or boroughs, thus not qualifying as towns under the Vermont Constitution. This was required to be done in order to keep the Constitution of the State of Vermont from violating the Fourteenth Amendment of the Constitution of the United States of America.

24. That Chapter II § 68 of the Constitution of the State of Vermont provides that every ten years the Senate may, by a vote of ⅔'s of its members, make proposals of amendment to the Constitution which proposals of amendment, if concurred in by a majority of the members of the House, shall be entered on the Journals of the two Houses and referred to the General Assembly then next to be chosen, and if a majority of the members of the House and Senate of the next following General Assembly shall respectfully concur in the proposals it shall be the duty of the General

Assembly to submit the proposal of amendment so concurred in, to a direct vote of the freemen of the State, and such proposal of amendment shall receive a majority of the votes of the freemen, shall become a part of the Constitution of the State of Vermont.

[fol. 8] 25. There is no provision in the Constitution of the State of Vermont to amend the Constitution except by the General Assembly itself unless a proposal is submitted by the General Assembly itself to the people. The people have no recourse. The General Assembly of Vermont has failed to submit constitutional amendments to the people which would provide for equitable reapportionment of both the Senate and House. The House of Representatives, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States has failed to submit to the people a proposal providing for equitable representation by the freemen of the State in the House of Representatives thus perpetuating themselves unconstitutionally in office.

26. According to the 1960 United States Census, the population of the State of Vermont was 389,881 of which 20,076 resided in Addison County, 25,091 in Bennington County, 22,853 in Caledonia County, 74,425 in Chittenden County, 6,064 in Essex County, 29,474 in Franklin County, 2,927 in Grand Isle County, 11,027 in Lamoille County, 16,014 in Orange County, 20,217 in Orleans County, 46,719 in Rutland County, 42,860 in Washington County, 29,776 in Windham County and 42,483 in Windsor County. Of this number, 149,921 or 38.5 per cent of the population of the State of Vermont, resided in urban area, that is communities of 5,000 or over while 239,960, being 61.5 per cent of the population, residing in rural areas, that is communities under 5,000. There are, in the State of Vermont, sixteen towns with a population of over 5,000 who are entitled to only one representative. They are as follows:

Burlington	35,531
Bennington	13,002
Rutland	18,325
Barre	10,387

Brattleboro	11,734
Middlebury	5,305
St. Johnsbury	8,869
Essex	7,090
Winooski	7,420
S. Burlington	6,903
St. Albans	8,806
Newport	5,019
Montpelier	8,872
Rockingham	5,704
[fol. 9]	
Hartford	6,355
Springfield	9,934

The remaining population of the State of Vermont for towns under 5,000 is set forth in Appendix C which is affixed hereto and made a part hereof.

Thirty-nine and forty-seven one-hundredths (39.47) per cent of the entire population of the State of Vermont live in thirteen towns having only thirteen Representatives out of two hundred and forty-six in the Vermont Legislature. The mathematical computation in percentage of representation in the Vermont Legislature is reflected in Appendix D which is attached hereto and made a part hereof.

27. A similar disapportionment and unrepresentative situation exists in the Vermont Senate. Under the Constitution hereinafter set forth, each County is entitled to one Senator and under the decision of the Supreme Court of the State of Vermont hereinbefore referred to, regard being always had to the counties having the largest fraction. The reapportionment formula respecting the State Senate adopted by the General Assembly may be political expedient but is not based upon majority rule and control while respecting minority rights. The object should be to attain the least disparity in representation in relation to population and to eliminate the greatest disparities, all based upon equitable and constitutional representation.

As the population of the various counties of Vermont and their representation are set forth in Appendix E which is attached hereto and made a part hereof, it is clear that

the most disparative county is Grand Isle with others in close pursuit. The provision in the Constitution of the State of Vermont, providing for one Senator from each county is contrary to the letter and spirit of the Fourteenth Amendment of the Constitution of the United States of America and accordingly, the petitioners allege the same to be null and void.

28. As illustrated by the foregoing, by the passage of time and changing population conditions, the constitutional provisions of the Constitution of the State of Vermont, as hereinbefore recited, no longer serve the original purpose [fol. 10] of securing to the voters of the State of Vermont the full constitutional values of their franchise. Moreover, the Legislative branch, namely, the General Assembly, consisting of the House of Representatives and Senate, has failed and prevented reapportionment of itself by failing to take appropriate action in submitting to the people any constitutional amendment which would alter the present system now existing. In addition, the said House of Representatives has repeatedly prevented the Senate from apportioning itself so that that would be fair and equitable representation thus granting full constitutional value of franchise to the people of Vermont.

29. That your petition, T. Garry Buckley, is a resident of the Town of Bennington, in the County of Bennington and your petitioner, Janette N. Berry is a resident of the Town of Brattleboro, in the County of Windham and your petitioner, Milton L. Hard is a resident of the City of Burlington, in the County of Chittenden, and are citizens of the United States and the State of Vermont, possessing the right to vote for members of the General Assembly including both State Senators and Town Representatives, and to cast votes that are of equal effect with that of every other citizen of the State of Vermont. Your petitioners say, however, that they are prevented from exercising such right by the gross malapportionment prescribed by Article 13 of Chapter II of the Constitution of the State of Vermont in that by virtue of said constitutional provision, your petitioners are denied the right of equal suffrage to that which they and others similarly situated are entitled. Peti-

tioners are also denied the equal protection of the laws and due process of law that is guaranteed to them under the Fourteenth Amendment of the Constitution of the United States of America in that such gross malapportionment constitutes arbitrary and capricious state action which denies a full vote of equality to petitioners, with other voters of the State of Vermont by reason of the failure to provide a reasonable classification of voters and members of the General Assembly.

30. That any action by the defendants in allowing the conduct of such elections for members of the House of Representatives and/or Senate of the State of Vermont, in [fol. 11] accordance with the present constitutional and unequitable allocation will continue to deprive your petitioners of their constitutional rights in that:

(a) Your petitioners will continue to be arbitrarily deprived of liberty and property without due process of law and will continue to be arbitrarily denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

(b) Your petitioners will continue to be effectively, increasingly and permanently deprived of effective equal vote in their government, be essentially disfranchised and be subjected to taxation without representation.

(c) Your petitioners will be deprived of the right of a free and equal election guaranteed by Article 8 Chapter I of the Constitution of the State of Vermont.

(d) Your petitioners are without remedy because of the unreasonable unequal representation now provided which is frozen in the Constitution of the State of Vermont in Article 18 Chapter II of the said Constitution of the State of Vermont amended in 1913 and because of the dominance enjoyed in the General Assembly by representatives from the less populated towns and counties. It is impossible to secure the passage of an amendment to Article 18 Chapter II of the Constitution of the State of Vermont and to

Article 13 of Chapter II of the Constitution of the State of Vermont or to force the Legislature to submit to the people an amendment providing for reapportionment of the General Assembly to comply with constitutional principles.

31. That unless relief is granted by an order from the Honorable Court, no action will be taken by the General Assembly and upon information and belief petitioners allege that no action will be taken by the next General As- [fol. 12] sembly for the reapportionment of its House of Representatives until the next period provided by the Time Lock Clause, so-called, to the State Constitution.

Wherefore, your Petitioners respectfully pray:

1. That in accordance with the provisions of Title 28, U.S.C. § 2281 and § 2284, the matters complained herein be heard and determined by a District Court of three Judges to be composed as provided therein.

2. That said court take jurisdiction over the matters herein alleged and that it hear and determine this cause and declare the rights of the petitioners in the premises.

3. That the Court declare and determine that the present Legislature reapportionment of the State of Vermont both as to the House and Senate has denied and continues to deny to the petitioners equal protection of the laws and that said apportionment is in violation of the 14th amendment of the Constitution of the United States.

4. That it be declared by the Honorable Court and the defendants be advised that Article 13, Chapter II of the Constitution of the State of Vermont providing for the election of one representative from each town and Article 18 Chapter II providing for a Senator from each County is unconstitutional and invalid by reason of the fact that it is in violation of the Fourteenth Amendment of the Constitution of the United States of America and is in violation of the Federal Civil Rights Acts 28 U.S.C. § 1343, 42 U.S.C. § 1983 and because same deprives petitioners of their rights, privileges and immunities secured by the Constitution of the United States.

5. That the Court declare and determine that Chapter II § 68 of the Constitution of the State of Vermont is unconstitutional and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and declare the time lock provision in the Vermont Constitution, set forth in said Chapter II § 68 of the Vermont Constitution to be null and void.

[fol. 13] 6. That the Court declare that the present Legislative apportionment of the State of Vermont has denied and continues to deny the petitioners equal protection of the laws and is in violation of the Fourteenth Amendment to the Constitution of the United States and that the rights of the petitioners as guaranteed thereunder has been impaired.

7. That the Court order and direct a reapportionment of the House of Representatives and State Senate of the State of Vermont in accordance with the present population of the State and said Order to provide that upon failure to comply with its provisions, the defendants be restrained and enjoined from engaging in any general election duties as granted to them by the laws of the State of Vermont and the Constitution of the State and that said restraining order remain in full force and effect until the Order directing reapportionment be complied with.

8. That the Court in the alternative enter an order directing the conduct of the next election for Representative and Senator to the General Assembly of the State of Vermont to be on an at-large basis, of all the people of the State of Vermont and that the defendants be enjoined from furnishing or receiving forms for nominations, petitions, certificates of elections or holding of elections upon a town or county basis.

9. That the Court retain jurisdiction of this cause for such other and further relief as may be just, equitable and proper in the premises.

Janette N. Berry, T. Garry Buckley, By Janette N. Berry.

A. Luke Crispe, Esquire, Brattleboro, Vermont.

Duly sworn to by Janette N. Berry, jurat omitted in printing.

[fol. 15] APPENDIX "A" TO AMENDED COMPLAINT

Summary of Population by Counties and Towns 1793

ADDISON COUNTY

Addison	402		
Bridport	450		
Bristol	211		
Cornwall	825		
Ferrisburg	481		
Hancock	56		
Kingston	101		
Leicester	344		
Middlebury	395		
Monkton	449		
New Haven	717		
Panton	220		
Salisbury	444		
Shoreham	701		
Vergennes	201		
Waybridge	174		
Whiting	249	Total	6420

BENNINGTON COUNTY

Arlington	992		
Bennington	2350		
Bromley	71		
Dorset	957		
Glastonbury	34		
Landgrove	31		
Manchester	1278		
Pownal	1732		
Reedsborough	63		
Rupert	1034		
Sandgate	773		
Shaftsbury	1990		
Stamford	272		
Sunderland	414		
Winhall	155		
Woodford	60	Total	12206

CHITTENDEN COUNTY

Alburgh	446
Bakersfield	13
Bolton	88
Burlington	330
Cambridge	359
Cambridge Gore	15
Charlotte	635
Colchester	137
Duxbury	39

[fol. 16] APPENDIX "A" Continued

CHITTENDEN COUNTY Continued

Elmore	12
Essex	354
Fairfax	254
Fairfield	126
Fletcher	47
Georgia	340
Highgate	103
Hinesburgh	454
Hungerford	40
Huntsburgh	46
Hydespark	43
Isle Mott	47
Jericho	381
Johnson	93
Middlesex	60
Milton	283
Minden	18
Moretown	24
Morristown	10
New Huntington	136
New Huntington Gore	31
North Hero	125
St. Albans	256
St. George	57
Shelburne	387
Smithfield	70
South Hero	537

Starksborough	40		
Swanton	74		
Underhill	59		
Waitsfield	61		
Waterbury	93		
Westford	63		
Williston	469		
Wolcott	32	Total	7287

ORANGE COUNTY

Barnet	477		
Berlin	134		
Bradford	654		
Braintree	221		
Brookfield	419		
Brownington	Not Inhabited		
Brunswick	66		
Burke	Not Inhabited		
Cabot	122		
Calais	45		
Canaan	19		
Chelsea	239		
Concord	49		
Corinth	578		
Danville	574		

[fol. 17] APPENDIX "A" Continued

ORANGE COUNTY Continued

Dewey's Gore	48
Fairley	463
Greensborough	19
Groton	45
Guildhall	158
Hardwick	3
Lemington	31
Littleton	63
Lumenburgh	119
Lyndon	59
Maidstone	125
Montpelier	118
Newbury	872
Northfield	40

Peachum	365		
Randolph	893		
Roxbury	14		
Ryegate	187		
St. Johnsbury	143		
Strafford	844		
Thetford	862		
Topsham	162		
Tunbridge	487		
Vershire	438		
Walden	11		
Walden's Gore	32		
Washington	72		
Whelock	33		
Wildersburgh	76		
Williamstown	146	Total	10526

RUTLAND COUNTY

Benson	658
Brandon	637
Castleton	809
Chittenden	159
Clarendon	1480
Danby	1206
Fair Haven	545
Harwick	165
Hubbardton	410
Ire	312
Killington	32
Middletown	699
Midway	34
Orwell	778
Pawlet	1458
Philadelphia	39
Pittsfield	49
Pittsford	859

[fol. 18] APPENDIX "A" Continued

RUTLAND COUNTY Continued

Poultney	1120
Rutland	1417

Shrewsbury	382		
Sudbury	268		
Tinmouth	935		
Wallingford	538		
Wells	620	Total	15590
Windham County			
Athens	450		
Brattleborough	1589		
Guilford	2422		
Dummerston	1490		
Halifax	1209		
Hinsdale	482		
Jamaica	263		
Johnson's Gore	49		
Londonderry	362		
Marlborough	629		
New Fane	660		
Putney	1848		
Rockingham	1235		
Somerset	111		
Stratton	95		
Thomlinson	561		
Townshend	678		
Wardsborough (n)	483		
Wardsborough (s)	270		
Westminster	1599		
Whitingham	442		
Wilmington	645	Total	17572
Windsor County			
Andover	275		
Barnard	673		
Bethel	473		
Bridgwater	293		
Cavendish	491		
Chester	981		
Hartford	988		
Hartland	1653		
Ludlow	179		
Norwich	1158		
Pomfret	710		

Reading	747	
Rocheseter	215	
Royalton	748	
Saltash	106	
Springfield	1097	
Stockbridge	100	
Weathersfield	1146	
Windsor	1542	
Woodstock	1597	Total 15740

[fol. 19] APPENDIX "B" TO AMENDED COMPLAINT

Population of Towns and Counties in State of Vermont as of 1962

ADDISON COUNTY		20,076
Addison	645	
Bridport	653	
Bristol	2159	
Cornwall	756	
Ferrisburg	1426	
Goshen	76	
Granville	215	
Hancock	323	
Leicester	551	
Lincoln	481	
Middlebury	5305	(Includes approx. 1200 Middlebury College Students)
Monkton	551	
New Haven	922	
Orwell	826	
Panton	352	
Ripton	131	
Salisbury	575	
Shoreham	786	
Starksboro	502	
Vergennes City	1921	
Waltham	186	
Weybridge	430	
Whiting	304	

Bennington County		25,091
Arlington	1605	
Bennington	13002	
Dorset	1150	
Glastonbury	0	
Landgrove	49	
Manchester	2470	
Peru	197	
Pownal	1509	
Readsboro	783	
Rupert	603	
Sandgate	93	
Searsburg	73	
Shaftsbury	1939	
Stamford	600	
Sunderland	566	
Winhall	245	
Woodford	207	

[fol. 20] Appendix "B" Continued

Caledonia County		22,853
Barnet	1445	
Burke	922	
Danville	1368	
Groton	631	
Hardwick	2349	
Kirby	235	
Lyndon	3425	(Includes approx. 280 students at Lyndonville College)
Newark	151	
Peacham	500	
Ryegate	894	
St. Johnsbury	8869	
Sheffield	342	
Stannard	113	
Sutton	476	
Walden	427	
Waterford	460	
Wheelock	246	

CHITTENDON COUNTY		74,425
Bolton	237	
Burlington	35531	
Charlotte	1271	
Essex	7090	
Colchester	4718	
Hinesburg	1180	
Huntington	518	
Jericho	1425	
Milton	2022	
Richmond	1303	
St. George	108	
Shelburne	1805	
South Burlington	6903	
Underhill	730	
Westford	680	
Williston	1484	
Winooski	7420	
ESSEX COUNTY		6,064
Averill	16	
Bloomfield	212	
Brighton	1535	
Brunswick	53	
Canaan	1094	
Concord	956	
East Haven	164	
Ferdinand	16	
Granby	56	
Guildhall	248	
Lemington	112	
Lunenburg	1237	

[fol. 21] APPENDIX "B" Continued

ESSEX COUNTY Continued	
Maidstone	78
Norton	241
Victory	46

FRANKLIN COUNTY		29,474
Bakersfield	664	
Berkshire	965	
Enosburg	1966	
Fairfax	1244	
Fairfield	1225	
Fletcher	399	
Franklin	796	
Georgia	1079	
Highgate	1608	
Montgomery	876	
Richford	2316	
St. Albans City	8806	
St. Albans Town	2303	
Sheldon	1281	
Swanton	3946	
GRAND ISLE COUNTY		2,927
Alburg	1123	
Grand Isle	624	
Isle LaMotte	238	
North Hero	328	
South Hero	614	
LAMOILLE COUNTY		11,027
Belvidere	155	
Cambridge	1295	
Eden	430	
Elmore	237	
Hyde Park	1219	
Johnson	1478	
Morristown	3347	
Stowe	1901	
Waterville	332	
Wolcott	633	
ORANGE COUNTY		16,014
Bradford	1619	
Braintree	536	
Brookfield	597	
Chelsea	957	
Corinth	775	
Fairlee	569	

[fol. 22] APPENDIX "B" Continued

ORANGE COUNTY Continued		
Newbury	1452	
Orange	430	
Randolph	3414	
Strafford	548	
Thetford	1049	
Topsham	638	
Tunbridge	743	
Vershire	236	
Washington	565	
West Fairle	333	
Williamstown	1553	
ORLEANS COUNTY		20,217
Albany	560	
Barton	3066	
Brownington	599	
Charleston	668	
Coventry	497	
Craftsbury	709	
Derby	2506	
Glover	683	
Greensboro	600	
Holland	376	
Irasburg	711	
Jay	197	
Lowell	617	
Morgan	260	
Newport City	5019	
Newport Town	1010	
Troy	1613	
Westfield	347	
Westmore	179	
RUTLAND COUNTY		46,719
Benson	549	
Brandon	3329	
Castleton	1902	
Chittenden	460	
Clarendon	1091	

Danby	891
Fair Haven	2378
Hubbardton	238
Ira	220
Mendon	461
Middletown Springs	381
Mount Holly	517
Mount Tabor	165
Pawlet	1112

[fol. 23] APPENDIX "B" Continued

RUTLAND COUNTY Continued

Pittsfield	254
Pittsford	2225
Poultney	3009
Proctor	2102
Rutland City	18325
Rutland Town	1542
Sherburne	266
Shrewsbury	445
Sudbury	249
Tinmouth	228
Wallingford	1439
Wells	419
West Haven	220
West Rutland	2302

WASHINGTON COUNTY		42,860
Barre City	10387	
Barre Town	4580	
Berlin	1306	
Cabot	763	
Calais	684	
Duxbury	546	
East Montpelier	1200	
Fayston	158	
Marshfield	891	
Middlesex	770	
Montpelier	8782	
Moretown	788	
Northfield	4511	

Plaintfield	966	
Roxbury	364	
Waitsfield	658	
Warren	469	
Waterbury	4303	(Inc. approx. 1200 at State Hospital)
Woodbury	317	
Worcester	417	
WINDHAM COUNTY		29,776
Athens	142	
Brattleboro	11734	
Brookline	127	
Dover	370	
Dummerston	872	
Grafton	426	
Guilford	823	
Halifax	268	
Jamaica	496	
Londonderry	898	
Marlboro	347	

[fol. 24] APPENDIX "B" Continued

WINDHAM COUNTY *Continued*

Newfane	714	
Putney	1177	
Rockingham	5704	
Somerset	4	
Stratton	24	
Townshend	643	
Vernon	865	
Wardsboro	322	
Westminster	1602	
Whitingham	838	
Wilmington	1245	
Windham	135	
WINDSOR COUNTY		42,483
Andover	215	
Baltimore	90	

Barnard	435
Bethel	1356
Cavendish	1223
Bridgewater	776
Chester	2318
Hartford	6355
Hartland	1592
Ludlow	2386
Norwich	1790
Plymouth	308
Pomfret	600
Reading	472
Rochester	879
Royalton	1388
Sharon	485
Springfield	9934
Stockbridge	392
Weathersfield	1254
Weston	442
West Windsor	539
Windsor	4468
Woodstock	2786

[fol. 25]

APPENDIX "C" TO AMENDED COMPLAINT

Towns in State of Vermont with population of less than 5,000

Lyndon	3425	Vergennes	1921
Colchester	4718	Ferrisburgh	1426
Swanton	3946	New Haven	922
Morristown	3347	Orwell	826
Randolph	3414	Shoreham	786
Derby	2506	Manchester	2470
Barton	3066	Arlington	1605
Brandon	3329	Dorset	1150
Poultney	3009	Pownal	1509
Barre Town	4580	Shaftsbury	1939
Northfield	4511	Hardwick	2349
Waterbury	4303	Burke	922
Windsor	4468	Ryegate	894
Woodstock	2786	Barnet	1445
Bristol	2159	Danville	1368

Milton	2022	Newbury	1452
Charlotte	1271	Thetford	1049
Hinesburg	1180	Williamstown	1553
Jericho	1425	Troy	1613
Richmond	1303	Newport Town	1010
Williston	1484	Castleton	1902
Shelburne	1805	Clarendon	1091
Brighton	1535	Danby	891
Lunenburg	1237	Fair Haven	2378
Canaan	1094	Pawlet	1112
Concord	956	Pittsford	2225
Richford	2316	Proctor	2102
St. Albans Town	2303	Rutland Town	1542
Enosburg	1966	Wallingford	1439
Chester	2318	West Rutland	2302
Fairfax	1244	Berlin	1306
Berkshire	965	E. Montpelier	1200
Fairfield	1225	Plainfield	966
Franklin	796	Marshfield	891
Georgia	1079	Putney	1177
Highgate	1608	Dummerston	872
Montgomery	876	Guilford	823
Sheldon	1281	Londonderry	898
Alburg	1123	Vernon	865
Cambridge	1295	Westminster	1602
Hyde Park	1219	Wilmington	1245
Johnson	1478	Whitingham	838
Stowe	1901	Bethel	1356
Chelsea	957	Cavendish	1223
Bradford	1619		

[fol. 26]

APPENDIX "D" TO AMENDED COMPLAINT.

(See opposite) ☞

389.881

1960 CENSUS POPULATION FOR VERMONT LOCAL GOVERNMENTS (TOWNS & CITIES)

1.	Burlington (City)	35,531	9.11	51.	Troy	1,613
2.	Rutland (City)	18,325	4.70	52.	Highgate	1,608
3.	Bennington	13,002	3.33	53.	Arlington	1,605
4.	Brattleboro	11,734	3.01	54.	Westminster	1,602
5.	Barre (City)	10,387	2.66	55.	Hartland	1,592
6.	Springfield	9,934	2.55	56.	Williamstown	1,553
7.	St. Johnsbury	8,869	2.28	57.	Brighton	1,545
8.	St. Albans (City)	8,806	2.26	58.	Rutland (Town)	1,542
9	Montpelier (City)	8,782	2.25	59	Pownal	1,509
10	Winooski (City)	7,420	1.90	60	Williston	1,484
11.	Essex	7,090	1.82	61	Johnson	1,478
12.	South Burlington	6,903	1.77	62	Newbury	1,452
13.	Hartford	6,355	1.63	63.	Barnet	1,445
14.	Rockingham	5,704	1.46	64	Wallingford	1,439
15.	Middlebury	5,305	1.36	65.	Ferrisburg	1,426
16.	Newport (City)	5,019	1.30	66	Jericho	1,425
17.	Colchester	4,718	1.21	67	Royalton	1,386
18.	Barre (Town)	4,580	1.18	68	Danville	1,368
19.	Northfield	4,511	1.16	69	Bethel	1,356
20.	Windsor	4,468	1.15	70	Berlin	1,306
21.	Waterbury	4,303	1.10	71	Richmond	1,303
22.	Swanton	3,946	1.01	72	Cambridge	1,295
23	Randolph	3,414	.89	73.	Sheldon	1,281
24.	Linden	3,425	.89	74.	Charlotte	1,271
25.	Morristown	3,347	.86	75.	Weathersfield	1,254
26.	Brandon	3,329	.85	76.	Wilmington	1,245
27.	Barton	3,066	.80	77.	Fairfax	1,244
28	Poultney	3,009	.78	78.	Lunenburg	1,237
29	Woodstock	2,786	.71	79	Fairfield	1,225
30	Derby	2,506	.64	80	Cavendish	1,223
31.	Manchester	2,470	.63	81	Hyde Park	1,219
32	Ludlow	2,386	.61	82.	East Montpelier	1,200
33.	Fair Haven	2,378	.61	83	Hinesburg	1,180
34	Hardwick	2,349	.60	84	Putney	1,177
35.	Chester	2,318	.60	85	Dorset	1,150
36	Richford	2,316	.60	86	Alburg	1,123
37.	St. Albans (Town)	2,303	.60	87	Pawlet	1,112
38	West Rutland	2,302	.60	88	Cannan	1,094
39	Pittsford	2,225	.58	89	Clarendon	1,091

APPENDIX "D" TO AMENDED COMPLAINT

[fol. 26]

4.	Brattleboro	11,734		54.	Westminster	1,602
5.	Barre (City)	10,387		55.	Hartland	1,592
6.	Springfield	9,934		56.	Williamstown	1,553
7.	St. Johnsbury	8,869		57.	Brighton	1,545
8.	St. Albans (City)	8,806		58.	Rutland (Town)	1,542
9	Montpelier (City)	8,782		59	Pownal	1,509
10	Winooski (City)	7,420		60	Williston	1,484
11.	Essex	7,090		61	Johnson	1,478
12.	South Burlington	6,903		62	Newbury	1,452
13.	Hartford	6,355		63	Barnet	1,445
14.	Rockingham	5,704		64	Wallingford	1,439
15.	Middlebury	5,305		65	Ferrisburg	1,426
16.	Newport (City)	5,019		66	Jericho	1,425
17.	Colchester	4,718		67	Royalton	1,386
18.	Barre (Town)	4,580		68	Danville	1,368
19.	Northfield	4,511		69	Bethel	1,356
20.	Windsor	4,468		70	Berlin	1,306
21.	Waterbury	4,303		71	Richmond	1,303
22.	Swanton	3,946		72	Cambridge	1,295
23.	Randolph	3,414		73.	Sheldon	1,281
24.	Linden	3,425		74.	Charlotte	1,271
25.	Morristown	3,347		75.	Weathersfield	1,254
26.	Brandon	3,329		76.	Wilmington	1,245
27.	Barton	3,066		77.	Fairfax	1,244
28.	Poultney	3,009		78	Lunenburg	1,237
29	Woodstock	2,786		79	Fairfield	1,225
30	Derby	2,506		80	Cavendish	1,223
31.	Manchester	2,470		81	Hyde Park	1,219
32	Ludlow	2,386		82	East Montpelier	1,200
33.	Fair Haven	2,378		83	Hinesburg	1,180
34	Hardwick	2,349		84	Putney	1,177
35.	Chester	2,318		85	Dorset	1,150
36	Richford	2,316		86	Alburg	1,123
37.	St. Albans (Town)	2,303		87	Pawlet	1,112
38.	West Rutland	2,302		88	Cannan	1,094
39	Pittsford	2,225		89	Clarendon	1,091
40.	Bristol	2,159		90.	Georgia	1,079
41.	Proctor	2,102		91	Thetford	1,049
42.	Milton	2,022		92	Newport (Town)	1,010
43.	Enosburg	1,966		93	Plainfield	966
44.	Shaftsbury	1,939		94	Berkshire	965
45	Vergennes (City)	1,921		95	Chelsea	957
46	Castleton	1,902		96	Concord	956
47	Stowe	1,901		97	New Haven	922
48.	Shelburne	1,805		98	Burke	922
49.	Norwich	1,790		99	Londonderry	898
50.	Bradford	1,619		100	Ryegate	894

TO AMENDED COMPLAINT

[fol. 26]

	TOWN	1960	
101.	Marshfield	891	.23
102.	Danby	891	.23
103.	Rochester	879	.23
104.	Montgomery	876	.22
105.	Dummerston	872	.22
106.	Vernon	865	.22
107.	Whitingham	838	.21
108.	Orwell	826	.21
109.	Guilford	823	.21
110.	Franklin	796	.20
111.	Moretown	788	.20
112.	Shoreham	786	.20
113.	Readsboro	783	.20
114.	Bridgewater	776	.20
115.	Corinth	775	.20
116.	Middlesex	770	.20
117.	Cabot	763	.20
118.	Cornwall	756	.20
119.	Tunbridge	743	.20
120.	Underhill	730	.20
121.	Newfane	714	.19
122.	Irasburg	711	.19
123.	Calais	684	.19
124.	Glover	683	.19
125.	Westford	680	.18
126.	Craftsbury	674	.18
127.	Charleston	668	.18
128.	Bakersfield	664	.18
129.	Waitsfield	658	.18
130.	Bridport	653	.17
131.	Addison	645	.17
132.	Townshend	643	.16
133.	Topsham	638	.16
134.	Wolcott	633	.16
135.	Groton	631	.16
136.	Grand Isle	624	.16
137.	Lowell	617	.16
138.	South Hero	614	.16
139.	Rupert	603	.15
140.	Pomfret	600	.15
141.	Stamford	600	.15
142.	Greensboro	600	.15
143.	Brownington	599	.15
144.	Brookfield	597	.15

	TOWN	1960	
151.	Leicester	551	.14
152.	Benson	549	.14
153.	Strafford	548	.14
154.	Duxbury	546	.14
155.	West Windsor	539	.14
156.	Braintree	536	.14
157.	Huntington	518	.13
158.	Mt. Holly	517	.13
159.	Starksboro	502	.13
160.	Jamaica	496	.13
161.	Sharon	485	.12
162.	Lincoln	481	.12
163.	Sutton	476	.12
164.	Reading	472	.12
165.	Warren	469	.12
166.	Mendon	461	.12
167.	Waterford	460	.12
168.	Chittenden	460	.12
169.	Coventry	458	.12
170.	Shrewsbury	445	.11
171.	Weston	442	.11
172.	Barnard	435	.11
173.	Peacham	433	.11
174.	Eden	430	.11
175.	Orange	430	.11
176.	Weybridge	430	.11
177.	Walden	427	.11
178.	Grafton	426	.11
179.	Wells	419	.11
180.	Worcester	417	.11
181.	Fletcher	399	.10
182.	Stockbridge	392	.10
183.	Middletown Springs	381	.10
184.	Holland	376	.10
185.	Dover	370	.10
186.	Roxbury	364	.10
187.	Panton	352	.10
188.	Westfield	347	.10
189.	Marlboro	347	.10
190.	Sheffield	342	.10
191.	West Fairlee	333	.10
192.	Waterville	332	.10
193.	North Hero	328	.09
194.	Hancock	323	.09

104.	Montgomery	878	.22
105.	Dummerston	872	.22
106.	Vernon	865	.22
107.	Whitingham	838	.21
108.	Orwell	826	.21
109.	Guilford	823	.21
110.	Franklin	796	.20
111.	Moretown	788	.20
112.	Shoreham	786	.20
113.	Readsboro	783	.20
114.	Bridgewater	776	.20
115.	Corinth	775	.20
116.	Middlesex	770	.20
117.	Cabot	763	.20
118.	Cornwall	756	.20
119.	Tunbridge	743	.20
120.	Underhill	730	.20
121.	Newfane	714	.19
122.	Irasburg	711	.19
123.	Calais	684	.19
124.	Glover	683	.19
125.	Westford	680	.18
126.	Craftsbury	674	.18
127.	Charleston	668	.18
128.	Bakersfield	664	.18
129.	Waitsfield	658	.18
130.	Bridport	653	.17
131.	Addison	645	.17
132.	Townshend	643	.16
133.	Topsham	638	.16
134.	Wolcott	633	.16
135.	Groton	631	.16
136.	Grand Isle	624	.16
137.	Lowell	617	.16
138.	South Hero	614	.16
139.	Rupert	603	.15
140.	Pomfret	600	.15
141.	Stamford	600	.15
142.	Greensboro	600	.15
143.	Brownington	599	.15
144.	Brookfield	597	.15
145.	Salisbury	575	.15
146.	Fairlee	569	.15
147.	Sunderland	566	.15
148.	Washington	565	.14
149.	Albany	560	.14
150.	Monkton	551	.14
154.	Duxbury	546	.14
155.	West Windsor	539	.14
156.	Braintree	536	.14
157.	Huntington	518	.13
158.	Mt. Holly	517	.13
159.	Starksboro	502	.13
160.	Jamaica	496	.13
161.	Sharon	485	.12
162.	Lincoln	481	.12
163.	Sutton	476	.12
164.	Reading	472	.12
165.	Warren	469	.12
166.	Mendon	461	.12
167.	Waterford	460	.12
168.	Chittenden	460	.12
169.	Coventry	458	.12
170.	Shrewsbury	445	.11
171.	Weston	442	.11
172.	Barnard	435	.11
173.	Peacham	433	.11
174.	Eden	430	.11
175.	Orange	430	.11
176.	Weybridge	430	.11
177.	Walden	427	.11
178.	Grafton	426	.11
179.	Wells	419	.11
180.	Worcester	417	.11
181.	Fletcher	399	.10
182.	Stockbridge	392	.10
183.	Middletown Springs	381	.10
184.	Holland	376	.10
185.	Dover	370	.10
186.	Roxbury	364	.10
187.	Panton	352	.10
188.	Westfield	347	.10
189.	Marlboro	347	.10
190.	Sheffield	342	.10
191.	West Fairlee	333	.10
192.	Waterville	332	.10
193	North Hero	328	.09
194.	Hancock	323	.09
195.	Wardsboro	322	.09
196.	Woodbury	317	.09
197.	Plymouth	308	.09
198.	Whiting	304	.08
199.	Halifax	268	.07
200.	Sherburne	266	.07

	TOWN	1960			TOWN	1960	
201	Morgan	260	.07	224	Westmore	179	.05
202	Pittsfield	254	.07	225	Mt. Taber	165	.04
203	Sudbury	249	.06	226	East Haven	164	.04
204	Guildhall	248	.06	227	Fayston	158	.04
205	Wheelock	246	.06	228	Belvidere	155	.04
206	Winhall	245	.06	229	Newark	151	.04
207	Norton	241	.06	230	Athens	142	.04
208	Hubbardton	238	.06	231	Windham	135	.03
209	Isle La Motte	238	.06	232	Ripton	131	.03
210	Bolton	237	.06	233	Brookline	127	.03
211	Elmore	237	.06	234	Stannard	113	.03
212	Vershire	236	.06	235	Lemington	112	.03
213	Kirby	235	.06	236	St. George	108	.03
214	Tinmouth	228	.06	237	Sandgate	93	.02
215	Ira	220	.06	238	Baltimore	90	.02
216	West Haven	220	.06	239	Maidstone	78	.02
217	Andover	215	.06	240	Goshen	76	.02
218	Granville	215	.06	241	Searsburg	73	.02
219	Bloomfield	212	.05	242	Brunswick	62	.02
220	Woodford	207	.05	243	Granby	56	.01
221	Jay	197	.05	244	Landgrove	49*	.01
222	Peru	194	.05	245	Victory	46	.01
223	Waltham	186	.05	246	Stratton	38*	.01

* Landgrove:- This official census figure is challenged by a resident of the town

* Stratton: The figure in the census report was 24, but later was corrected to 38

NOTE:

Number of towns	with population
5	10,000 - 30,531
11	5,000 - 10,000
14	2,500 - 5,000
52	1,000 - 2,500
67	500 - 1,000
77	100 - 500
10	under 100
246	

[fol. 28]

[fol. 29]

APPENDIX "E" TO AMENDED COMPLAINT

County	Population	No. Rep.
Addison County	20,076	23
Bennington County	25,091	18
Caledonia County	22,853	17
Chittenden County	74,425	17
Essex County	6,064	13
Franklin County	29,474	15
Grand Isle County	2,927	5
Lamoille County	11,127	10
Orange County	16,014	17
Orleans County	20,217	19
Rutland County	46,719	28
Washington County	42,860	30
Windham County	29,776	22
Windsor County	42,483	24

[fol. 32]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action File No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY and MILTON L. HARD, Petitioners,

v.

PHILIP H. HOFF, GOVERNOR OF VERMONT, et al., Respondents.

ANSWER OF DEFENDANTS HOFF AND ARMSTRONG—
Filed May 7, 1963

Now come the defendants, Philip H. Hoff, Governor of the State of Vermont, and Howard E. Armstrong, Secretary of State of the State of Vermont, and by their attorneys, Charles E. Gibson, Jr., Attorney General for the State of Vermont, and Chester S. Ketcham, Deputy Attorney General for the State of Vermont, make answer to the plaintiffs' amended petition as follows:

1. The defendants deny any cause of action as set forth in the petition which arises under the Fourteenth Amendment of the Constitution of the United States or 42 USCA §1983, 1988, or 28 USCA §1343 and §2201.

2. The defendants admit paragraph 2 of the plaintiffs' petition, as amended.

3. The defendants admit paragraph 3 of the plaintiffs' petition, as amended.

4. The defendants admit that Philip H. Hoff is Governor of the State of Vermont and that he has the power to [fol. 33] call the General Assembly of the State of Vermont into special session but deny that he has any duties with respect to the election of town representatives or state senators.

5. The defendants admit that Howard E. Armstrong is Secretary of State for the State of Vermont residing in Montpelier, Vermont, and is a member of the Board to Canvass Votes for United States Senators under Title 17 VSA §1422 and that he has limited statutory authority to perform certain ministerial duties in connection with the election of town representatives and state senators but deny that he has anything to do with the furnishing or printing of ballots for said elections and that he has any control over said elections.

6. The defendants admit paragraph 6 of the plaintiffs' petition, as amended.

7. The defendants admit paragraph 7 of the plaintiffs' petition, as amended.

8. The defendants deny that Philip H. Hoff, Governor, is charged with any duties with respect to the election of town representatives or state senators as alleged by the plaintiffs and admit that Howard E. Armstrong, Secretary of State, has the duty to furnish instructions on voting to election officials for the guidance of voters and of preparing and making applications to be submitted by voters for absentee ballots, but deny that he has any other election duties alleged in paragraph 8 of the plaintiff's petition, as amended.

9. The defendants admit paragraph 9 of the plaintiffs' petition, as amended.

10. The defendants admit paragraph 10 of the plaintiffs' petition, as amended.

[fol. 34] 11. The defendant admits paragraph 11 of the plaintiffs' petition, as amended.

12. The defendants admit paragraph 12 of the plaintiffs' petition, as amended.

13. The defendants admit paragraph 13 of the plaintiffs' petition, as amended.

14. The defendants admit paragraph 14 of the plaintiffs' petition, as amended.

15. The defendants admit paragraph 15 of the plaintiffs' petition, as amended.

16. The defendants admit that the original Constitution of the State of Vermont gave greater representation to some towns for a period of seven years, but deny that it provided for equal representation per person in the state legislature.

17. The defendants deny the allegations of paragraph 17 of the plaintiffs' petition, as amended.

18. The defendants admit paragraph 18 of the plaintiffs' petition, as amended.

19. The defendants admit paragraph 19 of the plaintiffs' petition, as amended.

20. The defendants admit paragraph 20 of the plaintiffs' petition, as amended.

21. The defendants admit the first sentence of paragraph 21 of the plaintiffs' petition, as amended. The defendants deny all other allegations of paragraph 21 of the plaintiffs' petition, as amended.

22. The defendants admit that under Chapter II, Section 6 of the Vermont Constitution, the General Assembly of the State of Vermont may grant charters, constitute [fol. 35] towns, boroughs and cities and has the power to

provide for the administration of the affairs of unorganized towns and gores, but denies that the General Assembly has taken any action or failed to take any action with respect to towns, unorganized towns and gores which violates the Fourteenth Amendment of the Constitution of the United States.

23. The defendants deny the allegations of paragraph 23 of the plaintiffs' petition, as amended.

24. The defendants admit paragraph 24 of the plaintiffs' petition, as amended.

25. The defendants admit the first and second sentences of paragraph 25 of the plaintiffs' petition, as amended, but deny all other allegations set forth in said paragraph.

26. The defendants deny the second sentence of paragraph 26 of the plaintiffs' petition, as amended, but admit the other allegations of said paragraph, except that your defendants are without sufficient information or knowledge to form a belief as to the truth and accuracy of Appendix D, attached to the plaintiffs' petition, as amended, and therefore deny same.

27. The defendants deny the allegations of paragraph 27 of the plaintiffs' petition, as amended.

28. The defendants deny the allegations of paragraph 28 of the plaintiffs' petition, as amended.

29. The defendants admit the first sentence of paragraph 29 of the plaintiffs' petition, as amended, but deny all other allegations set forth in said paragraph.

30. The defendants deny the allegations of paragraph 30 of the plaintiffs' petition, as amended.

[fol. 36] 31. The defendants deny the allegations of paragraph 31 of the plaintiffs' petition, as amended.

32. The defendants deny all allegations that have not been specifically admitted and further deny that the plaintiffs have been denied equal protection of the laws or have been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States by virtue of the present representation in either or both

Houses of the General Assembly of the State of Vermont, or by any provisions of the Vermont Constitution providing for representation in said General Assembly, or by any statutes of the State of Vermont providing for representation in said General Assembly, or by any of the alleged actions or inaction of the General Assembly of the State of Vermont.

Wherefore the defendants pray that the petition, as amended, be dismissed and judgment be granted to the defendants, with costs.

Dated at Montpelier, Vermont, this 7th day of May, A.D. 1963.

Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, By Charles E. Gibson, Jr., Attorney General and Chester S. Ketcham, Deputy Attorney General.

[fols. 37-38] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 39] [File endorsement omitted]

In the United States District Court

For the District of Vermont

Civil Action File No. 3653

T. Garry Buckley, Jannette N. Berry and Milton L. Hard, Petitioners,

v.

Philip H. Hoff, Governor of Vermont, et al., Respondents.

Answer of Leroy E. Lawrence, et al., Intervenors to the Plaintiffs' Amended Complaint—Filed May 24, 1963

Now Comes Intervenors Leroy E. Lawrence, et al., and by their attorneys, Edmunds, Austin & Wick, Burlington,

Vermont, make answer to the plaintiffs' Amended Complaint as follows:

1. Intervenors deny the allegations in Paragraph 1 of plaintiffs' Amended Complaint.

2. Intervenors admit the allegations contained in Paragraphs 2-7 of the plaintiffs' Amended Complaint.

3. Intervenors deny the allegations contained in Paragraph 8 of plaintiffs' Amended Complaint.

4. Intervenors admit the allegations contained in Paragraphs 9-15 of plaintiffs' Amended Complaint.

5. Intervenors deny the allegations contained in Paragraphs 16 and 17 of plaintiffs' Amended Complaint.

6. Intervenors admit the allegations contained in Paragraphs 18 and 19 of plaintiffs' Amended Complaint.

7. Intervenors deny the allegations contained in Paragraphs 20-23 of plaintiffs' Amended Complaint.

8. Intervenors admit the allegations contained in Paragraph 24 of plaintiffs' Amended Complaint.

9. Intervenors deny the allegations contained in Paragraphs 25-31 of plaintiffs' Amended Complaint.

[fol. 40] Wherefore the defendants pray that the Petition, as amended, be dismissed and judgment be granted to the defendants, with costs.

Dated at Burlington, Vermont this 17th day of May, 1963.

Leroy E. Lawrence, By Edmunds, Austin & Wick, By Hilton A. Wick, A Member of the Firm, 186 College Street, Burlington, Vermont.

[fol. 41] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action File No. 3653

T. GARRY BUCKLEY, JANNETTE N. BERRY and MILTON L. HARD, Petitioners,

v.

PHILIP H. HOFF, Governor of Vermont, et al., Respondents.

ANSWER OF DEFENDANT, SAMUEL A. PARSONS, TO THE PLAINTIFFS' AMENDED COMPLAINT—Filed May 24, 1963

Now Comes Defendant Samuel A. Parsons and by his attorneys, Edmunds, Austin & Wick. Burlington, Vermont, makes the following answer to the plaintiffs' Amended Complaint.

1. Defendant denies the allegations in Paragraph 1 of plaintiffs' Amended Complaint.

2. Defendant admits the allegations contained in Paragraphs 2-7 of the plaintiffs' Amended Complaint.

3. Defendant denies the allegations contained in Paragraph 8 of plaintiffs' Amended Complaint.

4. Defendant admits the allegations contained in Paragraphs 9-15 of plaintiffs' Amended Complaint.

5. Defendant denies the allegations contained in Paragraphs 16 and 17 of plaintiffs' Amended Complaint.

6. Defendant admits the allegations contained in Paragraphs 18 and 19 of plaintiffs' Amended Complaint.

7. Defendant denies the allegations contained in Paragraphs 20-23 of plaintiffs' Amended Complaint.

8. Defendant admits the allegations contained in Paragraph 24 of plaintiffs' Amended Complaint.

[fol. 42] 9. Defendant denies the allegations contained in Paragraphs 25-31 of plaintiffs' Amended Complaint.

Wherefore the defendants pray that the Petition, as amended, be dismissed and judgment be granted to the defendants, with costs.

Dated at Burlington, Vermont, this 17th day of May, 1963.

Samuel A. Parsons, By Edmunds, Austin & Wick, By Hilton A. Wick, A Member of the Firm, 186 College Street, Burlington, Vermont.

[fol. 43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action File No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY and MILTON L. HARD,

v.

PHILIP H. HOFF, Governor of the State of Vermont, et al.

ANSWER OF DEFENDANT VIRGINIA B. L'ECUYER TO PLAINTIFF'S AMENDED COMPLAINT—Filed May 28, 1963

Now comes the defendant Virginia B. L'Ecuyer, County Clerk of Grand Isle County, Vermont, and by her attorney, Harold Cooper Roberts, makes answer to the amended complaint of plaintiffs as follows:

1. This defendant denies that, on the averments made in the amended complaint of plaintiffs, any cause of action arises under the Constitution of the United States, the Fourteenth Amendment thereto, 28 U. S. C. §1343, 28

U. S. C. §2201, 42 U. S. C. §1983, or 42 U. S. C. §1988, or otherwise.

2. This defendant admits the averments of paragraph 2 of the amended complaint of plaintiffs.

3. This defendant admits the averments of paragraph 3 of the amended complaint of plaintiffs.

4. This defendant admits that Philip H. Hoff is Governor of the State of Vermont and that he has the power to call the General Assembly of the State of Vermont into special session, but denies that he has any duties with respect to the election of members to either branch of the General Assembly of Vermont.

5. This defendant admits that Howard E. Armstrong is Secretary of State for the State of Vermont, and that he has authority under the statutes of Vermont to perform certain limited ministerial duties with respect to the elec- [fol. 44] tion of members to both branches of the General Assembly of Vermont, but denies that he has any powers or duties with respect to the furnishing or printing of ballots for election to said offices or with respect to said elections.

6. This defendant denies that Samuel A. Parsons represents or can be made a party defendant representing the town clerks of Vermont as a class, or that all or any other town clerks are similarly situated; she admits all other averments of paragraph 6 of the amended complaint of plaintiffs.

7. This defendant admits that she is County Clerk of Grand Isle County and that, under the laws of the State of Vermont, she has certain responsibilities and duties in connection with the election of a State Senator from that county to the General Assembly of Vermont. She specifically denies that she represents the county clerks of Vermont as a class or any other county clerk in the State of Vermont, and further denies that any other county clerk in the State of Vermont is similarly situated.

8. This defendant denies that Philip H. Hoff, Governor of the State of Vermont, has any duties with respect to ap-

plications to be submitted by voters for ballot, printing and furnishing of ballots to the respective counties and towns, issuance of instructions to town clerks and local election officials, or supplying instructions and assistance to town officers and officials, in connection with election of State Senators and Representatives. She admits that Howard E. Armstrong, Secretary of State, has the duty of furnishing instructions on voting to election officials for the guidance of voters and of preparing and making applications to be submitted by voters for absentee ballots, but denies that said defendant has any other duties in connection with election of State Senators and Representatives averred in paragraph 8 of the amended complaint of plaintiffs.

[fol. 45] 9. This defendant admits the averments of paragraph 9 of the amended complaint of plaintiffs.

10. This defendant admits the averments of paragraph 10 of the amended complaint of plaintiffs.

11. This defendant admits the averments of paragraph 11 of the amended complaint of plaintiffs.

12. This defendant admits the averments of paragraph 12 of the amended complaint of plaintiffs.

13. This defendant admits the averments of paragraph 13 of the amended complaint of plaintiffs.

14. This defendant admits the averments of paragraph 14 of the amended complaint of plaintiffs.

15. This defendant admits the averments of paragraph 15 of the amended complaint of plaintiffs.

16. This defendant admits that the Vermont Constitution of 1786, in effect at the time of Vermont's admission to the Union in 1791 as the Fourteenth State, provided for the election of two representatives to the General Assembly by each town having eighty taxable inhabitants and of one representative by each other inhabited town, for a period of seven years, and thereafter for election of one representative to the General Assembly by each inhabited town; she further admits that a like provision was con-

tained in the Vermont Constitution of 1793, so that beginning in 1800 each town was, and ever since that date has been, entitled to elect one representative to the General Assembly. She denies that either the Constitution of 1786 or the Constitution of 1793 ever furnished to the people of Vermont equality of representation in the State Legislature or that either Constitution gave greater representation to larger towns, except to the limited extent and for the limited period of time herein set forth.

[fol. 46] 17. This defendant admits that the Fourteenth Amendment to the Constitution of the United States, having been ratified by the requisite number of States, became a part of the Constitution of the United States on July 28, 1868; she denies that the State of Vermont thereby relinquished any right to prescribe the form and basis of representation in the State legislature, and further denies that the provisions in that regard contained in the Vermont Constitutions of 1786 and 1793, or in the revision of the Constitution adopted in 1913, violated or now violate in any respect whatsoever the Fourteenth Amendment or any other provision of or amendment to the Constitution of the United States.

18. This defendant admits that there are now in the State of Vermont 246 towns and cities, each having one Representative in the Vermont legislature; that the Senate of the State of Vermont is now apportioned as set forth in the amended complaint of plaintiffs, and that the population of each county, according to the 1960 Census, is as set forth therein, except for immaterial errors as to four counties. She admits that the present apportionment of the Senate of Vermont is based upon a statute adopted by the General Assembly of Vermont and approved by the Governor on August 9, 1962, subsequent to the decision of the Supreme Court of Vermont in Mikell v. Rousseau et al., reported in 123 Vt. 139, but denies that said apportionment resulted from the said decision.

19. This defendant admits, on information and belief, the averments of paragraph 19 of the amended complaint of plaintiffs and of Appendix A attached to the amended complaint.

20. This defendant admits, on information and belief, that the population of the State of Vermont and of its towns, cities and counties, as determined by the United States Census of 1960, was as shown in Appendix B attached to the amended complaint; she is without knowledge or means of knowledge as to the population of the State [fol. 47] and of its municipal subdivisions on August 9, 1962, and therefore denies that the population on that date was as set forth in Appendix B.

21. This defendant admits that the population of the several cities and towns mentioned in paragraph 21 of the amended complaint of plaintiffs was, according to the United States Census of 1960, as set forth in said paragraph. She is advised and believes that the remaining averments of said paragraph are argumentative and state conclusions of law rather than facts, and therefore denies each and every said averment. She specifically denies that any invidious discrimination has been made between citizens of the several counties and municipal subdivisions of the State; and avers on the contrary that the basis of apportionment prescribed by the Constitution of Vermont and the statutes of the State assures a proper diffusion of political initiative as between its thinly populated counties and municipal subdivisions and those having concentrated masses, and gives recognition to the predominantly rural character of the State's population.

22. This defendant admits that under Chapter II, section 6, of the Constitution of Vermont the General Assembly may constitute towns, "borroughs" and cities, and that it has power to provide for administration of the affairs of unorganized towns and gores. She is advised and believes that the remaining averments of paragraph 22 of the amended complaint of plaintiffs are argumentative and state conclusions of law rather than facts, and therefore denies each and every said averment. She specifically denies that the General Assembly of the State of Vermont, by its action or inaction, has violated any provision of the Fourteenth Amendment to the Constitution of the United States; and further answers as in paragraph 21 hereof.

[fol. 48] 23. This defendant denies that the General Assembly of the State of Vermont has in any respect failed in its duties with respect to establishment and classification of towns and other municipal subdivisions, and avers on the contrary that the General Assembly has recognized that uninhabited or nearly uninhabited subdivisions do not qualify as towns, but is required by the Constitution of Vermont to allow the election of one Representative by each inhabited town. She is advised and believes that the remaining averments of said paragraph are argumentative and state conclusions of law rather than facts, and therefore denies each and every said averment; and further answers as in paragraph 21 hereof.

24. This defendant admits the averments of paragraph 24 of the amended complaint of plaintiffs.

25. This defendant admits that there is no provision in the Constitution of the State of Vermont for amendment of that Constitution except upon initiation of such amendment by the General Assembly. She denies each and every other averment of paragraph 25 of the amended complaint of plaintiffs.

26. This defendant admits that, by the United States Census of 1960, the total population of Vermont was 389,881, and the populations of Addison, Chittenden, Franklin, Grand Isle, Lamoille, Orange, Rutland, Washington, Windham and Windsor Counties were as averred in paragraph 26 of the amended complaint of plaintiffs. She denies each and every other averment of the said paragraph.

27. This defendant denies each and every averment of paragraph 27 of the amended complaint of plaintiffs and further answers as in paragraph 21 hereof.

28. This defendant is advised and believes that the averments of paragraph 28 of the amended complaint of [fol. 49] plaintiffs are argumentative and conclusions of law, and involve political issues properly addressed to legislative authorities or to the voters rather than to a court of law, and therefore denies each and every averment of said paragraph. She further answers as in paragraph 21 hereof.

29. This defendant admits the averments of paragraph 29 of the amended complaint of plaintiffs as to the respective residences of plaintiffs, and that they are citizens of the United States and of the State of Vermont. She is advised and believes that the remaining averments of said paragraph are argumentative and state conclusions of law rather than facts, and therefore denies each and every said averment. She further answers as in paragraph 21 hereof.

30. This defendant is advised and believes that the averments of paragraph 30 of the amended complaint of plaintiffs are argumentative and state conclusions of law rather than facts, and therefore denies each and every said averment; and further answers as in paragraph 21 hereof.

31. This defendant is advised and believes that the averments of paragraph 31 of the amended complaint of plaintiffs are argumentative and state conclusions of law rather than facts, and therefore denies each and every said averment; and further answers as in paragraph 21 hereof.

32. This defendant further denies that plaintiffs have been or will be deprived of liberty or property without due process of law; and denies that they have been or will be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; denies that they have been or will be deprived of their lawful right of franchise or be subjected to taxation without representation; denies that they have been or will be deprived of the right to a free and equal [fol. 50] election under Article VIII, section 1, of the Constitution of the State of Vermont; denies that they have been or will be deprived of any other rights to which they are lawfully entitled as citizens of the United States or of the State of Vermont; and further denies that any cause of action is stated in or by the amended complaint of plaintiffs.

Wherefore, this defendant respectfully prays this Honorable Court that the amended complaint of plaintiffs be dismissed and judgment be granted to defendants, with costs.

Dated at South Hero, Vermont, this 28th day of May, A. D. 1963.

Virginia B. L'Ecuyer, Grand Isle County Clerk, By Harold Cooper Roberts, South Hero, Vermont.

[fol. 51] Certificate of S vice (omitted in printing).

[fol. 52] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK, Plaintiffs,

—v.—

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle, Defendants,

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MACBRIDE, Defendants-Intervenors,

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS, Amici Curiae.

Before: Waterman and Smith, Circuit Judges, and Anderson, District Judge.

[fol. 53] Action by plaintiffs, on behalf of themselves and other voters similarly situated, seeking, first, a declaratory judgment that their constitutional rights are impaired by the present apportionment of members in the Vermont General Assembly, both in the House of Representatives

and in the Senate, in that in the House one Representative is elected from each organized town and city in the State irrespective of its population, and in that in the Senate fourteen out of thirty Senators are elected from each of the fourteen counties in the State irrespective of the county's population; and second, that the Governor, Secretary of State, a County Clerk, and a Town Clerk, named as defendants, be enjoined from engaging in any general election duties or holding elections for the General Assembly upon a town or county basis until a reapportionment shall have been effected which will not impair plaintiffs' constitutional rights, or, in the alternative, that General Assembly elections be held at large.

[fol. 54] A. Luke Crispe, Brattleboro; Joseph E. Frank, Burlington; Richard H. Thomas, III, Burlington, for Plaintiffs.

Hon. Charles E. Gibson, Jr., Attorney General; Chester S. Ketcham, Deputy Attorney General; for Defendants Hoff and Armstrong.

Edmunds, Austin & Wick, Hilton A. Wick, of counsel, Burlington, for Defendant Parsons.

Harold C. Roberts, South Hero, for Defendant L'Hueyer.

Hilton A. Wick of Edmunds, Austin & Wick, Burlington; Robert H. Erdman, John T. Ewing, Burlington; Philip A. Kolvoord, Essex Junction; Austin T. Foster, Derby Line, for Defendants-Intervenors.

Harley Walter Kidder, Barre, amicus curiae, pro se.
Joseph A. McNamara, Burlington, for Vermont League of Women Voters, amicus curiae.

[fol. 55]

OPINION—Filed July 10, 1964

Waterman, Circuit Judge:

On January 22, 1963, the original plaintiffs, T. Garry Buckley, a resident, voter, and taxpayer of the Town of Bennington in Bennington County, and Janette N. Berry, a resident, voter, and taxpayer of the Town of Brattleboro

in Windham County, filed their complaint in their own behalf and on behalf of all other persons similarly situated challenging the apportionment of the General Assembly of the State of Vermont. The complaint alleged that by reason of the applicable provisions of the Vermont State Constitution and by reason of the General Assembly's latest Apportionment of State Senators Bill, adopted August 9, 1962,[1] pursuant to said Constitution and the decision interpreting its meaning handed down by the Supreme Court of Vermont on July 19, 1962, *Mikell* v. *Rousseau*, 123 Vt. 139, 183 A.2d 817, petitioners were denied an equal suffrage with more favorably situated inhabitants of the State and were deprived of the equal protection of the laws and of due process of law under the Fourteenth Amendment to the Constitution of the United States. They also alleged that the United States District Court had jurisdiction under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and under 28 U.S.C. §1343.

[fol. 57] The complainants stated the Vermont General Assembly is composed of a Senate of 30 members and a House of Representatives of 246 members, and summarized the provisions of Chapter II, §13 and Chapter II, §18 of the Vermont Constitution, which provisions we set out herein in full:

[fol. 56] [1] V.S.A. Title 17, Chapter 33. Apportionment of State Senators.

§ 1881. Number to be elected

Counties may elect senators as follows: Addison, two; Bennington, two; Caledonia, two; Chittenden, five; Essex, one; Franklin, two; Grand Isle, one; Lamoille, one; Orange, one; Orleans, two; Rutland, three; Washington, three; Windham, two; Windsor, three.

This act amended former 17 V.S.A. §1881 in that it granted Chittenden County five senators when that county previously had four, and took away one senator from Rutland County, reducing its representation from four senators to three.

The latest change in apportionment prior to this was made in 1941.

[§ 13. Town representation; vacancies]

SECTION 13. In order that the freeman of the state may enjoy the benefit of election as equally as may be, each inhabited town in this state may, forever hereafter, hold elections therein and choose each one representative to represent them in the House of Representatives. Provided, however, that the General Assembly shall have the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise.

[§ 18. Senators; number; qualification; apportionment]

SECTION 18. The Senate shall be composed of thirty Senators, to be of the freemen of the county for which they are elected, respectively, who shall have attained the age of thirty years, and they shall be elected biennially by the freemen of each county respectively.

The Senators shall be apportioned to the several counties, according to the population, as ascertained by the census taken under the authority of Congress in the year 1910, regard being always had, in such apportionment, to the counties having the largest fraction, and each county being given at least one Senator.

The Legislature shall make a new apportionment of the Senators to the several counties, after the taking of each census of the United States, or after a census taken for the purpose of such apportionment, under the authority of this State, always regarding the above provisions of this section.

[fol. 58] They set out in their complaint detailed population statistics of towns, cities, and counties in the State[2] demonstrating how they claimed deprivation of their voting rights and requested that a three-judge district court be convened under 28 U.S.C. §§ 2281 and 2284.

[fol. 59] [2] The 1960 United States Census was used, and without objection was also used by the witnesses and in the evidentiary exhibits.

The original defendants were Vermont's Governor, Lieutenant Governor, Secretary of State, Speaker of the House of Representatives, and one Ernest W. Gibson, III, as Chairman of a Joint Committee of the 1961 General Assembly charged with investigating and reporting to the 1963 General Assembly any suggested action relative to any reapportionment of the Houses.

Petitioners prayed that these defendants, who it was alleged had responsibilities relative to the conduct of free and fair elections, be enjoined from performing their duties, that the court declare, pursuant to 28 U.S.C. §2201, that Chapter II, Article 13, and Chapter II, Article 18 of the State's Constitution are unconstitutional and invalid as violating the Constitution of the United States, and that

> "[T]he Court enter an order causing the reapportionment of the Representatives and Senatorial Districts of the State of Vermont in accordance with the population of the State and the provisions of the Constitution of the State of Vermont which provides for free [fol. 60] and equal election."

and

> "That in the alternative, the Court enter an order directing the conduct of the next election of Representatives and Senators to the General Assembly of the State of Vermont to be on an at-large basis of all the people of the State of Vermont being entitled to vote for all Senators and all Representatives to the General Assembly."

The District of Vermont is a one-judge district and, inasmuch as his son was a named defendant in this action, United States District Judge Ernest W. Gibson, Jr. found it necessary to disqualify himself from participation in the litigation; the only other federal judge in active service resident in the district, U. S. Circuit Judge Sterry R. Waterman, was designated to act in place of Judge Gibson; and a three judge district court was convened composed of Judge Waterman, Circuit Judge J. Joseph Smith of the U. S. Court of Appeals for the Second Circuit, and U. S. District Judge Robert P. Anderson, Chief Judge of the District Court for the District of Connecticut.

Motions to dismiss were filed by the defendants, and a hearing thereon was held on April 2, 1963, resulting in [fol. 61] the dismissal of the action as to the Lieutenant Governor, the Speaker of the House of Representatives and legislator Ernest W. Gibson, III. Also, it appearing that the plaintiffs might lack standing to maintain, as to each of them personally, that they were invidiously discriminated against under Chapter II, §18 and the Apportionment Bill of 1962, leave was requested by, and granted to, them to file an amended complaint and to summon as an additional defendant the County Clerk of Grand Isle County, a county entitled to one Senator although as of the 1960 U.S. Census having but 2,927 inhabitants.

Other interested citizens of the State, all of whom are members of the House of Representatives of the General Assembly, sought to intervene, their petition was granted, one of them, Samuel A. Parsons, the Town Clerk of the Town of Hubbardton, population 238, was joined by the petitioners as a party-defendant, and a resident, voter, and taxpayer of the City of Burlington, population 35,531, was added as an additional party plaintiff. The amended complaint was then filed and served, praying for the same sort of relief as originally sought but now seeking to restrain the Governor and the Secretary of State, the Town Clerk of Hubbardton and the County Clerk of Grand Isle County from complying with the provisions of the election laws relative to the conduct of elections for membership in the [fol. 62] State Senate and House of Representatives[3] and

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[fol. 63] [3] During the April 2 proceedings the court conducted an extensive informal, but reported, pre-trial proceeding so as to sharpen the issues and make any adjudication a meaningful one. Counsel fully cooperated. Answers to the amended complaint were filed by the end of May and the case set for hearing on July 23, 1963. At the request of petitioners' counsel, and upon stipulation, the hearing date was set over and October 29, 1963 was the date chosen.

In the amended complaint the prayers for injunctive relief read as follows:

> "That the Court order and direct a reapportionment of the House of Representatives and State Senate of the State of Vermont in accordance with the present population of the State and said Order to provide that upon failure to comply

further praying that the court hold unconstitutional, as violative of the Fourteenth Amendment of the United States Constitution, the amending provision of the Vermont State Constitution, Chapter II, §68, the so-called "time-lock" provision, which reads as follows:

[§ 68. Amending constitution]

SECTION 68. At the fifth biennial session of the General Assembly of this State following that of A.D. 1910, and at the session thereof every tenth year thereafter, the Senate may, by a vote of two-thirds of its members, make proposals of amendment, to the Constitution of the State, which proposals of amendment, if concurred in by a majority of the members of the House of Representatives, shall be entered on the journals of the two Houses, and referred to the General Assembly then next to be chosen, and be published in the principal newspapers of the State; and if a majority of the members of the Senate and of the House of Representatives of the next following General Assembly shall respectively concur in the same proposals of amendment, or any of them, it shall be the duty of the General Assembly to submit the proposals of amendment so concurred in to a direct vote of the freemen of the State; and such of said proposals of amendment as

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with its provisions, the defendants be restrained and enjoined from engaging in any general election duties as granted to them by the laws of the State of Vermont and the Constitution of the State and that said restraining order remain in full force and effect until the Order directing reapportionment be complied with."

and

"That the Court in the alternative enter an order directing the conduct of the next election for Representative and Senator to the General Assembly of the State of Vermont to be on an at-large basis, of all the people of the State of Vermont and that the defendants be enjoined from furnishing or receiving forms for nominations, petitions, certificates of elections or holding of elections upon a town or county basis."

Also, there was a prayer that the Court retain jurisdiction "for such other and further relief as may be just, equitable and proper."

shall receive a majority of the votes of the freemen voting thereon shall become a part of the Constitution of this State.

The General Assembly shall direct the manner of voting by the people upon the proposed amendments, and enact all such laws as shall be necessary to procure a free and fair vote upon each amendment proposed, and to carry into effect all the provisions of this section.

[fol. 64] On October 29-30, 1963, hearing was had on the merits of the amended complaint.[1]

At its inception one James Fitzpatrick, who had previously requested leave to intervene as a party plaintiff, was granted that leave, and the former complainant having withdrawn and there being no objection to the substitution, he was substituted as the complainant resident, voter, and taxpayer of the City of Burlington; and though leave to intervene as parties was denied to applicants representing the Vermont League of Women Voters and to one Harley Walter Kidder leave was granted them to file briefs as friends of the Court.

Seventy exhibits were admitted into evidence, which dealt with the historical bases for town unit representation in the State Legislature, with the history of changes in the composition of the Legislature from statehood to the present time, the geography and demography of the state, and matters of like import, and reflected most creditably upon the cooperative endeavors of counsel and litigants to assist the court in every way possible. Plaintiffs produced as witnesses Dr. Andrew E. Nuquist and Dr. Robert S. Babcock, long-time Political Science professors at the University of Vermont, who testified at great length in support of plaintiffs' claims and identified many of the plain-[fol. 66] tiffs' exhibits. Defendant Parsons' testimony was

[fol. 65] [1] At the conclusion of the hearing, upon request of counsel, November 27, 1963 was fixed as the date when briefs and requested findings of fact were to be filed, and reply briefs and other material were to be filed by December 13. The time for such representations was later extended, after the transcript became available, to January 17, 1964.

also lengthy, and, drawing upon his many years as a town officer and as the representative from his town in the General Assembly, he sought to prove by his testimony the importance of the Vermont town in Vermont economic and political life, and to prove that the State Legislature, though heavily weighted in its membership in favor of the smaller communities of the state, was conscious of the needs of all the people of the state.

Evidence was uncontradicted that, contrary to the importance of counties in many states, counties in Vermont are unimportant administrative political subdivisions, and that the county's primary purpose is to serve as a judicial district.

The City of Burlington's representative in the Legislature was permitted to testify that it was his belief that certain defeated legislation at the last Term of the General Assembly would have passed if the Houses had been more equitably apportioned; and intervenor Foster testified, contrary to the testimony of Professor Nuquist, that, from his studies, it was his reasoned belief that the people could [fol. 67] be summoned into a constitutional convention and the amending provision of the Vermont State Constitution set forth *supra* could be by-passed by having the members of the convention directly propose to the people amendments to the organic law of the state.

Much of this testimony and many of these exhibits,[5] in particular the evidence relating to the history of the state,

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[fol. 68] [5] For instance, Dr. Babcock, testifying for the plaintiffs, introduced into evidence Plaintiffs' Exhibit 5, a map setting forth suggested electoral units for a 150-member House. This exhibit is of little pertinence now. In his suggested House, majority control would have vested in representatives elected by only one-third of the State's population, and a House so constituted would not meet the standard set by the decision in Reynolds v. Sims, 32 U.S.L. Week, 4535 (U.S. June 15, 1964), —— U.S. ——, 84 S.Ct. 1362, for compliance with the Equal Protection Clause of the Fourteenth Amendment.

It is also of interest that the plaintiffs briefed their case on the proposition that the Equal Protection Clause prevents a state from having a system of unit representation by which one legislator represents more than twice as many constituents as another. In view of the "substantially equal" standard announced subsequently in Reynolds v. Sims, supra, this was a conservative position.

have now become, at this stage of these proceedings, immaterial and irrelevant, for, within the month, the Supreme Court of the United States, speaking through Chief Justice Warren, has held that neither history, nor custom, nor tradition, nor heritage, provide rational bases for justifying the composition of a State Legislature if the membership of the Legislature is not fairly and equitably apportioned to the population of the state, and that in bicameral legislatures both Houses must be so apportioned. The Court held that:

> ". . . as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds* v. *Sims*, 32 U.S.L. Week 4535, 4544 (U.S. June 15, 1964), 84 S.Ct. 1362, 1385.

In the light of this standard so recently received we find that both Houses of the Vermont General Assembly are malapportioned.

[fol. 69] At the outset it is clear that the House of Representatives is grossly malapportioned, and that citizens of the state's larger communities are invidiously discriminated against because of the inequality of representation that results from the provision of the Vermont Constitution that gives each "inhabited" or organized town or city in the state one representative. The one representative from the Town of Stratton represents but 38 people, yet has an equal vote with the one representative elected by the 35,531 people of the City of Burlington. 132,790 persons, more than one-third of the total population of the state of 389,881 live in the cities of Burlington, Rutland, Barre, St. Albans, Montpelier and Winooski and the towns of Bennington, Brattleboro, Springfield and St. Johnsbury, which together have but a total of ten votes in a House of 246 members. When the population of twelve more mu-

nicipalities, the City of Newport and the towns of Essex, South Burlington, Hartford, Rockingham, Middlebury, Colchester, Barre, Northfield, Windsor, Waterbury and Swanton, are added to the population of the ten municipalities just listed, one finds that in these 22 cities and towns more than one-half of the state's population, 195,692 people, reside—yet, far from having any comparable representation in the House they have but 22 of 246 repre-
[fol. 70] sentatives, or not quite 9% of the members of the House. These examples of invidious disparities could be multiplied by citing startling comparison after startling comparison, as, for instance, noting that the total population of the ten least populated towns is 661 souls and that of the ten heaviest populated cities and towns is 132,790 or that the 2,322 inhabitants of the 22 least populated towns have equal representation in the House with the 195,692 persons residing in the 22 heaviest populated municipalities whose inhabitants total more than one-half of the state's population. Voters in 82 towns containing less than 475 inhabitants per town elect 82 House members, or one-third of the membership of the House, although one-third of the total population elects only 10 members, and voters in 124 towns with less than 700 inhabitants per town and less than 12% of the state's population elect a majority of that membership while a majority of the people of the state, over 50%, elect but 22. And, too, Burlington's one representative represents more people than the 107 representatives from the 107 smallest towns, none of which has a population in excess of 600.

The Vermont Senate is composed of thirty members, no more, no less, chosen on the basis of counties in proportion to their population, but with each county, irrespective of
[fol. 71] its population, guaranteed at least one of the thirty.

If the Senate were apportioned exactly according to the state's population of 389,881, each Senator would represent 12,996 persons, or 3⅓% of the state's population. The Vermont Senate, as of January 1962, ranked third among all the upper Houses of State Legislatures in representativeness (the percentage of the state's total pop-

ulation necessary to elect a majority of the members of the body), for a majority of the Senators represent 47% of the state's population. Even so, the Senate is malapportioned, for the one Senator from Grand Isle County represents but 2,927 persons, or 7/10 of 1% of the state's people, whereas the one Senator from Orange County represents 16,014 people. Similarly, the one Senator from Essex County represents 6,083 people, or 1½% (.0156) of the population of the state. Under the state's Constitution, it is impossible to apportion the Senate in any way which will not result in at least a 5-1 disparity between the largest and the smallest number of people represented per Senator. Inasmuch as the disparity caused by the representation of the two counties of Grand Isle and Essex causes the inhabitants of the 12 other counties to be invidiously under-represented, it follows that the [fol. 71a] Senate is malapportioned despite its high national ranking for overall representativeness. See, on this point, however, as to the unlikely constitutionality of this representativeness, *Davis* v. *Mann*, 32 U.S. L. Week 4579 (U.S. June 15, 1964), 84 S.Ct. 1453, in which the Supreme Court held that a legislative apportionment plan of the State of Virginia under which 41.1% of the population can elect a majority of the Upper House and 45% of the population can elect a majority of the Lower House violates the Equal Protection Clause.

In view of the failure of the Legislature to vote to submit to the people proposed amendments to this State's organic law that would rectify these malapportionments, and the failure of the Legislature to take any permissible corrective legislative action, the plaintiffs had no other recourse except that of application to the courts. No initiative procedure is provided for under Vermont law. Therefore, we now turn to a consideration of the effect of the "time-lock" provisions in Section 68 of the Vermont Constitution, *supra*, and we hold that it does not restrain this Court from ordering that the Vermont General Assembly be reapportioned or restrain action by officers of the State to set in motion machinery to do so by any other means that would not be discriminatory under the Federal Con-

[fol. 71b] stitution. We hold here that the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution is being violated by the present apportionment and "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Reynolds* v. *Sims, supra,* at 4549, 84 S.Ct. 1362, 1393.

As we have stated earlier in this opinion, footnote 2, *supra,* plaintiffs have requested the Court that it not only declare that the present legislative apportionments violate the Equal Protection Clause but also restrain election officers from proceeding with General Assembly elections until reapportionment is accomplished, or order that the election of all 276 General Assemblymen be on a state-wide basis. At this point we should say and we find that defendant Virginia L'Eucyer is properly representative of all the County Clerks in the State and defendant Samuel A. Parsons is properly representative of all the Town and City Clerks in the State charged with election duties relative to the election of state legislators.

Should we adopt either of these alternatives we would act with great reluctance, for we realize that we would be acting in an area that is an unaccustomed one for judges. Moreover, we are very conscious of the well-known law-abiding characteristics of the independent people of Ver- [fol. 71c] mont, and of the justified reputation that the State and its people enjoy for integrity, responsibility, and fairness when a course of action is required to be followed. Therefore, although we declare that both Houses of the General Assembly are so apportioned that their composition violates the equal protection of the laws to all voters in a most fundamental way, in that substantially equal representation is denied to all voters in the State in the State's deliberative law-making Assembly, we are constrained to delay adopting any remedy until counsel have had an opportunity to appear before us once again with suggested orders for our issuance.

It is our opinion that a reasonable opportunity should be afforded the legislative and executive officials of the state promptly to initiate the means for the voters of the

state to effect an equitable legislative apportionment without the necessity of further action by the court. As of now we take the view that no progress has been made in this area since *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962), despite the palpable injustice of not making progress, because of an understandable desire to await decisions of the United States Supreme Court in the pending cases that were disposed of by that Court on June 15 and June 22, as well as the decision of this Court in this case, and because of a sense of frustration due to the "time lock" provision relative to the frequency within which amend-
[fol. 71d] ments to the State Constitution could be initiated.

There is no excuse now for any further inaction. Within constitutional standards the people of the State should determine the framework and composition of the General Assembly, the number of its members, and the length of their terms of service, the qualifications for membership, the number, size and boundaries of electoral units, the number of legislators to be chosen from each unit—always having in mind that the seats in each house of a bicameral state legislature in order to meet the constitutional standard must be apportioned so as to provide substantially equal legislative representation for all citizens of all places within the state, and the weight of a citizen's vote cannot be made to depend on where he lives.

Accommodation by the people of Vermont to federal constitutional standards will require a reasonable space of time within which to work out the details of the proposals which will bring the Constitution of the State into conformity with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

To bring about this needed conformity the officers of the State, executive and legislative, are, of course, empowered to act. The overturning of the state's traditional
[fol. 71e] reliance upon the election to the lower House of the General Assembly of one Representative from each town in the State, each town as a town being an electoral unit, a traditional reliance which antedates the formation of our national Union and the admission of Vermont into it as the fourteenth state, as well as the tradition of having at least one Senator represent each county, the county

being an electoral unit, could be most difficult to accomplish. The transition should be easier than otherwise, however, in view of the fact that not only the Chief Executive and the Secretary of State are parties litigant, but, in addition, ten members of the House of Representatives, which House we have declared to be apportioned in violation of the United States Constitution, are also, at their own request, parties litigant. As such litigants these influential persons are of course subject to the decrees, orders, and mandates of this Court, and we apprehend that the cooperation which the court has received to date from all parties will continue.

We are aware that persons seeking nominations for the Senate or for the House of Representatives at the September primary elections must file their petitions on [fol. 71f] or before July 29; and we realize that, upon good cause shown, we should consider the proximity of a forthcoming election and the mechanics and complexities of the State's election laws; and that, even though we have found that this General Assembly is invalidly apportioned, we are permitted to act equitably and in accord with general equitable principles to avoid too much sudden disruption of the State's political way of life.

Accordingly we will receive suggestions for decretal orders at a hearing to be held at the U. S. Court House in Brattleboro, Vermont, on the 22nd day of July at 10:30 A.M. and we shall expect counsel to propose and to consider appropriate decrees to execute the decision we have made, and unless the defendants and defendant intervenors choose to default in their duty to proceed with dispatch to correct the present malapportionments we shall expect from them the submission of a plan of action, with a suggested time-table for the plan's execution.

The foregoing opinion contains our findings of fact and conclusions of law, but we shall entertain suggestions for further findings, if counsel care to request any, at the hearing on July 22.

[fol. 71g] Irrespective of what may be accomplished on July 22, we shall retain jurisdiction of the case, and we point out to counsel and those they represent that, as the

Supreme Court of Vermont stated so well in *Mikell* v. *Rousseau, supra*, at 123 Vt. 139, 149: "This is not a time for ingenuity, it is a time to be fair."

Sterry R. Waterman, U. S. Circuit Judge, J. Joseph Smith, U. S. Circuit Judge, Robert P. Anderson, U. S. District Judge.

[fol. 72]

CLERK'S NOTE

Court's Exhibit #1—entitled, "Plan of Action" is omitted from the record here. It appears at side folio 154, printed page 106, *infra*.

[fol. 75] [File endorsement omitted]

[fol. 76]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, JAMES FITZPATRICK,

vs.

PHILIP H. HOFF—Governor of Vermont, HOWARD ARMSTRONG—Secretary of State, Vermont, SAMUEL A. PARSONS, VIRGINIA L'ECUYER, LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI, ROGER L. MACBRIDE, Intervenors.

Transcript of Hearing on the "Enlargement of the Decree," before The Honorable Sterry R. Waterman, J. Joseph Smith, and Robert P. Anderson, Circuit Court Justices, at Brattleboro, Vermont, 22 July 1964.

APPEARANCES:

Honorable Charles E. Gibson, Jr., Attorney General, State of Vermont; Honorable Chester E. Ketcham, As-

sistant Attorney General, State of Vermont; Hilton A. Wick, Esquire, John T. Ewing, Esquire, Attorneys for Intervenors; Joseph A. McNamara, Esquire, Attorney for League of Women Voters, A. Luke Crispe, Esquire, Richard H. Thomas, Esquire, Attorneys for Complainants; Harley [fol. 77] W. Kidder, Esquire, Pro Se; Austin T. Foster, Esquire, Pro Se; Roger L. MacBride, Esquire, Pro Se.

Herman J. Vesper, 32 Western Avenue, Brattleboro, Vermont, Official Federal Court Reporter.

10:35 a.m., 22 July 1964

Judge Waterman: Good morning. Mr. Clerk, will you call the case?

Mr. Murray: Yes, Your Honor. T. Gary Buckley, Janette M. Berry, James Fitzpatrick versus Philip H. Hoff, Governor of Vermont; Howard Armstrong, Secretary of the State—

Judge Waterman: And, others.

Mr. Murray: —et als.,—

Judge Waterman: Counsel—

Mr. Murray: —hearing on enlargement of decree.

Judge Waterman: Are counsel all here Mr. Crispe?

Mr. Crispe: Yes, Your Honor.

Judge Waterman: Your associates?

Mr. Crispe: Mr. Thomas.

[fol. 78] Judge Waterman: Attorney General Gibson?

General Gibson: Yes, Your Honor.

Judge Waterman: Your associates?—Mr. Wick?

Mr. Wick: Yes, Your Honor.

Judge Waterman: Do you have associates?

Mr. Wick: Mr. Foster is here with me, as counsel.

Judge Waterman: Are we going to have the honor of having Mr. Foster entered as an attorney of record as well as the defendant?

Mr. Wick: Mr. Foster is counsel on our Brief and we would be pleased to have him.

Judge Waterman: I noticed that, and I wanted to apologize to him for not mentioning him in the Opinion. I had him in there, originally, then I thought perhaps, I'd better wait.

Mr. Wick: I should think, Your Honor, his name should appear as counsel.

Judge Waterman: All right, that's fine. It is a great honor to this Court to have him do so. Mr. McNamara?

Mr. McNamara: Yes, present.

[fol. 79] Judge Waterman: Now, we have an application on the part of Mr. Roberts, to withdraw as counsel for Virginia L'Ecuyer, Clerk of the County Grand Isle and we have that confirmed by a telegram from Mrs. L'Ecuyer received this morning. Does anyone intend to represent Mrs. L'Ecuyer, or, make any appearance for her in place of Mr. Roberts?

(No response).

Judge Waterman: I gather by your silence, that there is no attorney who intends to represent Mrs. L'Ecuyer. Accordingly, we refuse the request in spite of the confirmation by the client. This is a class action and she was sued in her capacity as one of a class of fourteen and her individual desires in the matter cannot be considered unless some other counsel cares to enter.

(No response).

Judge Waterman: Here is the application, Mr. Clerk. (Handed to Mr. Murray) —Also, in going through my papers, I find that the application, on the part of the League of Women Voters, to appear as friends of the Court, handed to me by Mr. McNamara, in Chambers, on October 29, has never reached the Clerk's desk, and I give you that now and I am sure you have that notice and a record that we granted the application, but that is the original application.

Mr. McNamara: Thank you, Your Honor.

[fol. 80] Judge Waterman: All right.

Mr. Murray: You can look through the docket entries, if you wish, I will.

Judge Waterman: The docket entry is all right, I've checked that. I don't know where you insert it in the regular files, but I think that's the only document that I have that you should have.

Now, counsel are, of course, familiar with the Opinion? I take it, the first order of business will be to ask counsel for the Complainants, what if anything, he wishes us to do, what if anything, he has prepared, in connection with the Prayers of his Petition.

Mr. Crispe: May it Please the Court, I believe the Court is aware from newspaper accounts that a meeting was held in the Governor's Chambers in Montpelier Friday night, where the attorneys for the various parties met for the purpose of endeavoring to reach an agreement as to a plan that would be presented to this Court. The lawyers in the case, all agreed to the plan, which was submitted to us by Governor Hoff. I might say, that certain corrections were made at that time, but in the final analysis, the parties, or the attorneys, did not, Your Honor, sign the stipulations at that time, because they wanted to submit the plan, or the stipulation, rather, to their respective clients for approval.

[fol. 81] I might say, Your Honor, that basically, the plan of the Governor, is agreeable to the Petitioners, except, that the schedule of dates, as proposed in the Governor's plan, seems to the Petitioners, not, does not conform with the Opinion of this Court, nor, with the spirit of the language of Judge Warren—Chief Justice Warren,—in the Opinions rendered by him.

Because this plan was proposed by the Governor, Your Honor, and because our plan is basically the Governor's plan, with the exception of this schedule of dates, I believe, in all fairness to His Excellency, the plan should be presented by him. So that we can then make our objections to it, which would simply be, as to the time, that the plan of the Governor should be implemented.

And if I may, Your Honor, I would like to ask leave to allow the Attorney for the Governor to present his plan.

Judge Waterman: All right. You have in mind, that the Prayers of this Complaint, are somewhat narrow. The Complainant has not enlarged his Prayers. Of course, the Court has general jurisdiction anyway. We can do, probably, pretty much as we wish, but as I read your Prayers, Mr. Crispe, you only ask us to do one of two things;—To either to enjoin all general elections to be held in the future [fol. 82] for the offices of Representatives to the Lower House and Senator to the Upper House, or, in lieu of that, to reapportion the State equitably ourselves, and that is where you now stand. You ask for no other relief?

Mr. Crispe: Except our general plan, Your Honor, that this Court retain jurisdiction,—

Judge Waterman: Oh, yes.

Mr. Crispe:—of the plan, and grant to us whatever relief is just in the premises. We still rely on our Prayer that this Court order the reapportionment of the Legislature and this Court, make a plan.

We still rely on that,—because it may be, that the Court later will have to do this. We don't say that now is the time to do this.

We agree, with Your Honor, that the Legislature should have an opportunity to do this themselves. However, "When" is the issue. And, I think the Governor's plan provides for the Legislature to reapportion itself.

We only think that the Governor delays the action too long. That is our position. But, we still rely on the Prayer that this Court formulate, or adopt a plan that,—with the exception, that at this time, that we do feel, in line with the Court's language, that the Legislature should be given the first opportunity to do so.

[fol. 83] Judge Waterman: Attorney General Gibson?

General Gibson: If it Please the Court, I have with me, copies of the plan which we are presenting for the Governor and the Secretary of the State.

Mr. Murray: Would you like to file the original, Your Honor? It is submitted in quadruplicate. (Handed same to the Court).

Judge Waterman: Should it be filed? Hold that for a minute.

General Gibson: Would the Court like for me to proceed at this time?

Judge Waterman: Yes, sir.

Judge Anderson: Why don't you let us read it first? We can read it through, then,—

(The three judges read documents silently).

General Gibson: If it Please the Court, as you can see, that the first thing that is provided for in this plan, is that

the 1964 elections proceed as they would, without the reapportionment. We realize,—

Judge Waterman: As to that first paragraph, you start off by saying as the 1964 election is already in progress. I am an old hand at this business; I do not think anything is printed until after the 29th of July. Even in the primary [fol. 84] or in the general election. What do you mean, it's still in progress?

General Gibson: It's in progress, Your Honor, in that candidates have announced for offices—

Judge Waterman: Oh, yes.

Attorney General: —for about all of the,—I can't say that in every town in the State, but I am sure that at this time, with less than a week to go,—with less than a week to go for filing Petitions, candidates have already announced for office; made their plans and have done campaigning, so in that sense, we think that this election is already started.

As the Court well knows, as it would be the 29th of July, is the deadline for filing petitions; then, our primary elections will be September 8th.

Under the general equity powers of the Court, as indicated in the,—some of the recent cases from the United States Supreme Court, this Court can decide and as the Court has indicated in its own Opinion, whether to require elections to be held according to a new—by reapportioned; for reapportioned Legislature, or, for the Legislature as it presently exists.

We feel that this is so close to the time of election, and the fact that candidates have announced and undoubtedly [fol. 85] are campaigning and some have probably spent money, that it would disrupt the orderly election procedure to have a special session, or to order a special session at this time.

As the Court knows, this,—the business of reapportionment, will make great changes in the Vermont system of Government. Some of these have existed for 188 years; as far as the House; and as far as the Senate, for maybe, 120 some years. People need some time to get used to the idea.

More important, the Legislature should have the proper amount of time to do a good job as far as reapportionment,

and not try to shove any kind of a plan through and in a couple of weeks, or, whatever time may be required, or a week. There is less than a week, or a little more between now and the time of filing petitions. Candidates would have to know whether or not they are going to be allowed to run or, not run.

Judge Waterman: You must now know and understand that this only applies to County Senators and Town Representatives. It does not apply to Governors, Lieutenant Governors, Secretaries of State and Attorneys General. They will still be elected and get their timely, or primary papers around and everything else, in the normal course. And, are you standing there with a straight face and tell-[fol. 86] ing me that the County Senators have already begun to campaign and within the primary parties, and the town representatives, have already begun to campaign within the primaries?

General Gibson: I can't say that they all have, Your Honor, but I am sure that some of them have, yes,—and from the discussion I have had, just in the past few days, I am sure that at least some of them have. But, in any case, there are people who are running from,—I assume by now,—from every town in the State. If there is reapportionment, this will be presumably the larger districts. Some of these people may not know whether they are going to be running from a larger district or not, and to all sorts of decisions like that, have to be made.

The,—we think that this is such an important problem to the people of the State, that in order to do it right, they should have the time to really consider the various alternatives, as far as variety of plans.

This Court is probably aware, there were seven plans in the "Free Press" this week. Undoubtedly, there will be many, many, many more plans presented for legislative consideration.

If they are going to do a thorough job and going to consider all of these plans, they are going to have to have hearings on them; consider just what plan would be most [fol. 87] appropriate for Vermont within the constitutional prescription, of course, of the Fourteenth Amendment, and

so that the Legislature really needs time, I think, to do a thorough job.

I just don't think it can be done in a special session. Which, without at least disrupting the time for filing petitions, which would have to be done in less than a week.

We feel very strongly about that, Your Honor. As far as the other dates set forth in the plan here, the time table, —it seems to provide for a reasonable amount of time for the General Assembly to reapportion itself.

This is the entire philosophy of this plan here. It is a job for the General Assembly to do, and it does leave it up to them. However, it does provide in the General,—in the event the General Assembly does not do the job within certain period of time, that the Governor has an opportunity to present a reapportionment plan to the Court for the Court's consideration, before the Court would take whatever steps it might take beyond, at that point.

It does leave some room here, for reapportionment for the General Assembly to decide in what plan, or manner, it should want to proceed, about reapportionment.

Judge Anderson: Well, in effect, this time schedule would [fol. 88] permit an illegally constituted Legislature to persist into 1966. The plan merely,—the Legislature would simply meet bi-annually, but of course, do you think the Supreme Court Opinion makes allowance for that much time?

General Gibson: Yes, I think it does, Your Honor. It is indicated that it was within the—it was up to the Lower Court, within its general equitable power, to make a determination as to whether it should require a special session, or whether it could proceed with the elections to operate according to the schedule. Now,—

Judge Anderson: The States which have Legislatures which meet annually, will, undoubtedly, have to reconstitute themselves as they are now illegally constituted, before the '66 Legislature comes in.

General Gibson: Yes.

Judge Anderson: I don't think the Opinion can be construed any other way. If "a reasonable time" means, a reasonable time, where a Legislature, or for a Legislature to reconstitute itself before '66, where you have annually-meeting Legislatures, how can it be said that simply be-

cause the State has its Legislature meeting bi-annually, "within a reasonable time" for those people, is two years.

General Gibson: Well, I think that—

Judge Anderson: I don't think it is a "reasonable time," [fol. 89] —"reasonable time" is more of an absolute standard, I think.

General Gibson: Well, it does not seem to me, the Court sets such a standard as that, Your Honor. It seems to me that the Court adheres to weigh the equities of disrupting the election procedure, and it is not giving the Legislature, really, ample time to really do a good job and consider all the various plans that may come before them, and get the job done right,—getting it through.

Judge Anderson: Well then, where do you find it to be held in the Opinion, for an annually-meeting Legislature, to say, go over for two sessions?

General Gibson: I don't think,—

Judge Anderson: —of course, they didn't specify.

General Gibson: No, I don't think it is specified.

Judge Anderson: They didn't specify it, but I wondered if there is anything in the Opinion where you can read between the lines, that it would justify that?

General Gibson: Again, I think it is just purely and simply just the Courts' deciding whether the disruption of the present election procedures is going to be such that they ought to let it go and let the Legislature, in its normal [fol. 90] course, which will be January, do this job.

Judge Anderson: Well that, that's the next Legislature?

General Gibson: Yes.

Judge Anderson: If it met annually, they will have to have the job done, but, by summer.

General Gibson: Well, this is provided for that it be done by this Legislature. This next Legislature, so that when it comes in, and that it will be effective for any subsequent Legislature.

Judge Waterman: Mr. Gibson, you, of course, are acquainted with what the Chief Justice Warren said. Possibly the rest of the court room is not. I quote: "It is enough to say now, that once a State Legislature, or legislative ap-

portionment scheme has been found to be unconstitutional, it would be the unusual case, in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."

That's the base of the syllogism. Then comes the next sentence:

"However, under certain circumstances, such as where an impending election is imminent,"—I ask you, is there an impending election imminent in the State of Vermont at this moment?

[fol. 91] General Gibson: Yes, I think so, Your Honor, and I think that this is the unusual case, that we are so close to it.

Judge Waterman: "And a State's election machinery is already in progress." Is the State's election machinery already in progress?

General Gibson: I'm not sure in the language of that, Your Honor. We feel that the,—in terms of filing particular documents, it is not; it is, in terms of people going around and getting names on their petitions, which is part of the election machinery;—they have been doing that.

Judge Waterman: I see the Secretary of State here, is the election machinery in progress, Mr. Secretary?

Mr. Armstrong: I say it is. The primary petitions have been published; notices have been sent to Town Clerks, and candidates for office have been supplied with these primary petitions, and so I presume,—well, I have already filed mine, myself.

Judge Waterman: I saw that in the paper. Well, we don't—you're not involved as an individual in this matter. "Such as where an impending election is imminent, and a State's election machinery is already in progress, equitable considerations might justify a Court, in withholding the [fol. 92] granting of immediately effective relief, in a legislative apportionment case, even though the existing apportionment scheme was found invalid."

Now, you're addressing yourself to the third sentence. "In awarding, or withholding immediate relief, a Court is entitled to, and should consider the proximity of the forthcoming election and the mechanics and complexities of the

State's election laws, and should act and rely upon general equitable principles."

All right now, we understand, and I think the whole court room understands the issue we are talking about,—you can go ahead and talk some more.

General Gibson: Well, I don't think there's much more I can say on that particular issue. So far as the special session; we have taken the view first, by Mr. Armstrong, that the election machinery is in progress; that it would be an inequity in the favor of permitting the '65 Legislature to do the job and that to do the job properly, we just don't see how it can be done in a short period of time that its got to be done, as it is here in Vermont.

I don't know that there's any reason for me to discuss the plans further. I think it's—

Judge Waterman: Oh yes, there is. Do you want the Legislature,—do you want this Court to approve the elec- [fol. 93] tions of the Legislature, by an apportionment which we presume we'll hand down a Decree within a day or two, if Mr. Crispe is prepared, or, has prepared one, declaring that Legislature is improperly apportioned, and therefore, it convenes,—it is null and void, and you want us to permit it to convene for six months period, until July one, and pass tax legislation and possibly proposed bonds, and do a number of other things, in a "de facto" manner, after it's been held void de jure. Now, what do you have to say to that?

General Gibson: I think the case of the Supreme Court of the United States felt that the Court could certainly do this under that Decision that you read some of,—where you just read some of the language, and it certainly would never have used that language if it hadn't felt this perfectly proper as a constitutional matter.

There are many cases, I think,—I can't cite them now, but there are cases that have said that it doesn't—the fact that it hasn't been reapportioned, or, is not reapportioned properly, does not negate any of the Legislation that it passes. I think it operates as a "de facto" body. There is a substantial point of law that makes up that point of view.

Judge Smith: What is the difficulty with having a special session of the existing Legislature, to take up promptly,

[fol. 94] this very difficult problem, and reapportion whether they, the reapportionment goes into effect for the elections this Fall, or later?

General Gibson: The problem, Your Honor, among other things, would be that this is during the period of time when there are election campaigns and I think it would be a more heated and difficult job for the Legislature to do this at this time, than it would be next January, after the campaigns and elections are all over.

I can't see, if the Court should decide within its equitable powers, that this Legislature, at this election, can proceed as presently set up, that it makes any difference, once you get by these elections, whether it's reapportionment is done now, it takes effect with the '66 election, or whether it is done in the tail end of '65, for the '66 elections, or whether it's the first order of business of the Legislature of '65. As long as it takes effect for the next election.

Judge Anderson: Well, you talk about the '66 election, —Legislature,—but you see, it may be necessary some time in '65, to call a special session of the Legislature and here, you would be calling a defunct Legislature. An illegal Lgislature.

General Gibson: Well, if the Court Please, we do have [fol. 95] an alternative plan here if the Court does not feel that this plan of action here is speedy enough,— An alternative plan for the Court's consideration. We do not have it prepared, but the Governor has indicated what he would like to have happen in case this plan is not considered speedy enough and I am prepared to tell the Court about that at such time as the Court wants me to do so.

Judge Waterman: Well, Mr. Crispe has suggested that he's agreeable to whatever your plan is, except the timing feature. And therefore, he gave way, or yielded to you for that purpose, but since the Court has opened up, by a series of interrogatories, the named matter, perhaps we can let that rest now and hear from Mr. Wick, if he has anything to say.

Mr. Wick: Yes, if the Court Please, I received this plan of action in its present form, late Monday, and mailed it to each of my clients Monday evening.

Now, I found that none of them have actually received it yet, but I presume it will be arriving in the mail today.

I have had an opportunity to speak to—with the majority of them, however, and those that I've talked with, do endorse the plan which has been suggested to the Court.

[fol. 96] As Mr. Crispe indicated, the attorneys did meet Friday evening with the Governor and after almost four hours of discussion, we did agree to recommend this plan that the State has presented to our respective clients. And, I submit, that it is reasonable and believe this Court will find it to be such.

It is quite important to all of us, that the present elections do continue to proceed in an orderly fashion, and that the change, as Mr. Gibson has indicated, is substantial.

I don't think it will be an extremely difficult matter of reapportioning the Legislature according to the terms of the Supreme Court Opinions, but I do think it will take some real reason and judgment, as has been indicated and as, perhaps, the Court has seen, where seven plans were published in the "Free Press" yesterday. I didn't personally review each of them in detail, but from what I did see, I don't think any of them comply with the standards set forth in the recent United States Supreme Court Decisions.

As I read those decisions, it requires that each election district be substantially equal in population; that overall averages are just thrown out.

There will be some problems, I think, in lining up the towns and cities in Vermont, to get them into districts that [fol. 97] are substantially the same in population as the census, of course, is taken upon Town or City lines. And, it will take some time to really sit down and work this out; although, I am sure it can be done.

Now, I agree with the Attorney General and also with Mr. Armstrong, that the present election is in progress. Th petitions have been distributed and many of them have been completed; some of them have been filed, and it would be quite confusing to have one set of elections at the primary in September the eighth and then have to have elections for senators and representatives, perhaps later this year.

Judge Waterman: Well, that's not confusing. I ran all alone in the separate primaries for the United States Senate on the Republican ticket, all alone.

Mr. Wick: Yes, but at that time, it was not a Legislature having to consider reapportionment during the period that the campaign would be conducted. And, I believe, and my clients believe, that it may take two or three months of public hearings and giving everybody an opportunity to have its say, before the Legislature can properly reapportion itself, and to have that occurring this Fall, while other elections are in progress, I do submit to the Court, would be quite confusing and most difficult, and that, perhaps, the plan thus adopted, would not be acceptable by this Court. [fol. 98] It seems to me that we want to have every reasonable opportunity to adopt the plan that can be approved by this Court, within the meaning of the U.S. Supreme Court Decisions.

Now, in regard to what is a "reasonable time," the Maryland case, in that situation, as I recall, the U.S. Supreme Court held that since the legislators in Maryland were elected for four year terms, there was sufficient time within which they could reapportion themselves and there was no reason to require a particular special session or a special election and I read in the Colorado Opinion, approval of what the District Court did there, two years ago, in 1962, where the dates were—

Judge Waterman: Yes, well, that's—

Mr. Wick: —comparable to what our dates,—

Judge Waterman: The Colorado case bothers the Court very much.

Mr. Wick: Well, we think—

Judge Waterman: Not for the reason that you're indicating, but for the other reason, that apparently, by a process of appealing and appealing and appealing, the reapportionment can be delayed and delayed and delayed. How many times did the case get to the District Court in [fol. 99] Colorado? How many times were the voters asked to vote and so forth?

Mr. Wick: Well,—

Judge Waterman: We do not intend to have that type of fiasco in Vermont.

Mr. Wick: I recall, Your Honor, that the reapportionment was approved in 1962 and then the appeal was taken that year to the U.S. Supreme Court. Now, what may have happened before that time, I don't know. But, I understood the Supreme Court did approve the action of the District Court in going ahead with the present reapportionment, perhaps to that appeal to the U.S. Supreme Court in '62 and I think our situation is comparable—about the same, as far as time goes,—is comparable,—about the same.

As I recall, the Decision was handed down there August tenth of 1962. The District Court, the three-judge Court, was asked to stay the election, then pending, and they did not do so and the U.S. Supreme Court approved that in the Opinion that was handed down June fifteenth.

As far as the time suggested in the Plan of Action, we think it reasonable to permit the Legislature, by July one of 1965, to reapportion itself, or set up the plans for reapportionment, which we submit, might be a constitutional convention. We speak in favor of the plans submitted by [fol. 100] the State, although, I want to say again, that I have not had an opportunity to speak with each of my clients.

Judge Waterman: We're particularly interested in one client which we see in the court room now, Mr. MacBride, who has made certain speeches and comments in the press. I feel if you have not talked with him, I suggest you retire and visit with him.

Mr. Wick: I have not had an opportunity to speak with him.

Judge Waterman: All right, please do that and we'll go back to Attorney Gibson. Now, what is your justification for this long delay? Assuming—assuming that we feel exactly the way you do, and I think we are on record more or less, in other cases, as to how we feel as individuals or as individual judges, other than as we have to feel now, as inferior judges, obeying our masters;—assuming we go along with you—just assuming,—and permit the elections to go along unchallenged, untrammeled, and unaffected; as Attorney,—as the present Attorney General of this State, what do you have to say as to the legislation such an assembly might pass?

General Gibson: I think there is a substantial body of law, Your Honor, that says that this type of legislation is valid and constitutional.

Judge Waterman: What would you say to our going [fol. 101] along with you and saying that the first and only order of business of the 1965 General Assembly, so elected, shall be to submit to the people a reapportionment plan, and shall then recess and do no more business until that reapportionment plan is acted upon and approval of the Court is received?

General Gibson: Well, I think the matter, that it might be going a little too far to insist that the legislature submit that particular plan, to the people, it seems to me that the legislature—

Judge Waterman: Well, all right.

General Gibson: —can, or not.

Judge Waterman: As Attorney General, you say that's all right to have the legislature submit it to the Court for its approval?

Judge Anderson: Do you feel that the legislature can, —this is a constitutional provision in effect, isn't it, that has to be yielded? I mean, the Decision of the Court has, in effect, excised a portion of the Constitution;—that part that provides for the legislative branch of the Government. That's a constitutional, traditionally, and historically, and orthodox, constitutional function, and it is your feeling that a legislature can amend the constitution so that it can make a statute?

[fol. 102] General Gibson: No, Your Honor, I don't feel the legislature can just, by themselves, amend the Constitution. But, I think that once this Court has nullified those constitutional provisions providing for the composition of our legislature, that then there exists,—they don't exist, and our own Constitution, our Vermont Legislature, has the inherent power to go ahead and pass legislation providing for the compensation of the Legislature. Our Supreme Court has indicated that the—

Judge Anderson: The Vermont Supreme Court?

General Gibson: The Vermont Supreme Court has indicated that our Constitution is merely a limitation upon

the power of the legislation, not a grant of power, and so, I think that the Legislature would have the power to go ahead and pass legislation and then they could take such steps as may be necessary to get the Vermont Constitution, to amend the Vermont Constitution by whatever means they chose.

Judge Anderson: You don't feel it's necessary to submit that to the people at any time?

General Gibson: The amendment to the Constitution would be under our—yes,—but,—and I would assume, Your Honor, that steps would be taken to amend the Vermont Constitution, but of course, this—disregarding this ten-year time-lock provision, that it should go to two legisla-[fol. 103] tures, then to the people, and—

Judge Anderson: Well, I thought they knocked that out.

General Gibson: We aren't sure whether that is—how much of that time-lock has been knocked out; whether it,—the ten-year business has been knocked out.

Judge Waterman: Well, that brings us to the real basic problem and the problem which I wish Mr. Wick would discuss with his client in private and that is, when, how, where and under what circumstances do all of you gentlemen propose to appeal what we've done.

We would like to get the appeals out of the way, so that you, Mr. Attorney General, would not be disturbed about what we did about the time-lock, and, a number of other people involved, would not be disturbed about the Opinion we filed. And, we feel that the longer this case is left at loose ends, and we cite you Colorado, the more difficulty we will all get into. You are disturbed about what we did about the time-lock?

General Gibson: Well, I just don't know for sure what you did about it.

Judge Waterman: Well, the Supreme Court of the United States has the last word on that and the sooner we get it up there, the happier we'll all be, right?

[fol. 104] General Gibson: There's no question in mind, Your Honor, but what, if it is the Federal Constitution is in conflict with the State Constitution, or the State Constitution's provisions are going to be set aside, but what I say about the time-lock, I'm not sure whether it merely nullified

the ten-year restriction, or whether you have also nullified the business that instead of it going through two legislatures, and then to the people;—it seems to me to make a constitutional amendment, we have to have some authority in our Constitution, and so we lose the ten-year time-lock.

Judge Waterman: You want to delay all this until the middle of 1956?

General Gibson: No, Your Honor.

Judge Waterman: Well, I don't see anything else. Nothing is to be done—nothing is to be done until 1966. We're an inferior court and there's an appeal. Then, it comes back. My goodness man!

General Gibson: Well, I suppose there is always an opportunity or a chance for an appeal if the Court is not, does not approve of a particular plan, that the legislature submits to it. But, we do not feel that we are trying to—

Judge Waterman: Well, I'm not disturbed about the Court. I'm disturbed about the individuals who say that [fol. 105] they are going to appeal this. I want them to appeal it. I want to get it out of the way.

General Gibson: I'm not aware of any individuals, whether there are any or not, who are going to appeal. We are not appealing. My clients are not appealing, Your Honor, from the Opinion of the Court. I don't know that once the Decree comes down, what it is going to say, but on the basis of the Opinion, we don't feel there is any need to appeal.

Judge Anderson: Incidentally, do you have that citation of the Supreme Court case, the Vermont Supreme Court case?

General Gibson: No, but I can get it for you.

Judge Anderson: I'd appreciate it.

General Gibson: Perhaps I should present to the Court—

Judge Waterman: Well, I asked you a question, Mr. Gibson, and we've all gone far afield. I take it the answer is "no," that you would not think it desirable, as Attorney for the Governor and the Secretary of the State, and as the chief law officer of the Commonwealth, to have a General Assembly convened, whose only order of business would be submit either by its own action, or through the people of the State, a new apportionment?

[fol, 106] General Gibson: I think the plan here gives the Legislature a more reasonable time than we would have if we did it that way, Your Honor. We would have to,—so they would spend, say, several months on the reapportionment, in the winter and spring of 1965, and then have special elections and then have them come back in the summer, fall and so forth, to carry on the rest of the business of the State.

Judge Anderson: What about the Legislature setting up a constitutional convention?

General Gibson: That is something I think I'll let Mr. Wick discuss. I assume that the Court is interested and we will discuss it.

This plan here, gives some lee-way to, so that whether the Legislature reapportions itself, or tries to provide legislation for a constitutional convention, this could be done and this is why this is the only reason, I suppose, for this delay until February of '66, so that if they passed the law providing for a constitutional convention,—I'm not prepared to tell the Court at this time, that I think it is constitutional under the Vermont Constitution. I would certainly like to get the advice of the Vermont Supreme Court on that. I don't know if we can get it, but I think that is the reason—

Judge Waterman: We will abstain.

[fol. 107] General Gibson: That's the reason for the extension to February of '66, so if there was a constitutional convention provided for, or decided it was all right, that some case goes to the Vermont Supreme Court and said it was all right, then, one would be held.

We would give some time for that, for the Legislature to do it itself. Of course, July first date is satisfactory. I think that in light of what the Court has said that perhaps I should present the Governor's alternative plan at this time.

Judge Waterman: Oh no, never mind. Let's take things in regular order.

General Gibson: All right, Your Honor.

Judge Waterman: Mr. Wick, while you were out, the Attorney General indicated some qualms about the legality fundamental constitutional legality, of what this Court has

done, particularly, with reference to,—and I use the evil word, "Over-riding the time-lock." To which I have indicated, that if there's any doubt in anyone's mind, as to the legality of what we've done, we want to fix it, right now, so it can get up to the Supreme Court promptly.

Judge Anderson: I'm not sure that he understands about the legality of what we've done.

General Gibson: May I interrupt at this time, Your [fol. 108] Honor. I have no question about it,—I don't raise a, that question.

Judge Waterman: Are you raising it, Mr. Wick?

Mr. Wick: No, I'm not, Your Honor.

Judge Waterman: Are any of your clients raising it?

Mr. Wick: I don't believe so.

Judge Waterman: You have four lawyers as clients?

Mr. Wick: Yes, frankly, we have not specifically discussed it, except I have advised them that from the Opinions of the U.S. Supreme Court in this area, it is clear from the June 15 Opinions and earlier ones, the Vermont Constitution contravenes the Fourteenth Amendment of the United States Constitution, or any other provisions of the U.S. Constitution is supreme. So, I don't personally question it and I don't think my clients question the rights and actual duty of this Court, in view of the U.S. Supreme Court Opinion on June 15, to hold that provisions, so far as reapportionment goes.

The time-lock is not enforceable. I do think there are some unanswered questions as to reapportionment procedures by the Legislature; as the Court is aware, the Ver- [fol. 109] mont Constitution provides for amendment in the Constitution of Vermont to be initiated in the Senate passed there by a two-thirds vote and then passed by the House by a majority vote and then at the next regular session to be passed by both Houses by a majority vote. Then, submit it to the voters by Referendum for approval.

Now, I presume, within the meaning of the U.S. Supreme Court Decisions, that temporary legislation could be passed by the Vermont Legislature, to provide for reapportionment of the House and Senate, but that ultimately there should be an amendment to the Vermont Constitution to accomplish that.

That is one of the reasons I believe that Mr. Foster believes, and other of my clients believe, that perhaps, the best method of reapportionment, would be to call a Constitutional Convention.

Judge Waterman: All right. Now, suppose this Court, and again, I am talking through my hat;—suppose we should grant Mr. Crispe's Prayer and then enjoin the General Elections in November, for Town Representatives and County Senators, stay the injunction of, pending the calling of the special session of the Legislature, which, in turn, if it wished, could call a Constitutional Convention, or, pending the calling of the Constitutional Convention, or pending [fol. 110] an appeal to the Supreme Court of the United States.

Outside of the fact that they have thrown in the Constitutional Convention idea, that's exactly what was done in Connecticut. Would that meet your constitutional problems and give you an opportunity of clarifying the things that you say are rather fuzzy?

Mr. Wick: I don't think so, Your Honor. My understanding is, that you are suggesting the calling of a Special Session?

Judge Waterman: No, I'm suggesting that we enjoin the election,—period. Then, the burden is on someone else to do some number of things. We will stay the—our Order, pending all of these items.

Judge Anderson: In other words, you have an alternative, I think. The present Legislature to reapportion itself, to go right ahead and work out a plan of redistricting and get it done within a few months.

Judge Waterman: You've got until November to do it.

Judge Anderson: Yes, they've got until November to do it, or, it could set up a constitutional convention with representatives from large and different houses of the Legislature, executive branches of government and so forth, or, whatever they want to agree upon, and they would then [fol. 111] have a time limit before which they could submit the plan, or institute a constitutional amendment which would cover this. Maybe in the Spring some time.

Judge Waterman: There are a number of people in this court room who have not been here before. I think it only

fair to them and to you counsel to say, that the way I'm conducting myself now, is on the basis of what we did before.

The Court received wonderful cooperation from counsel in connection with a pre-trial proceeding, and at the time of trial itself, the Court and counsel, working together, hand-in-glove, to get the case in proper shape. I think counsel deserves the public statement by the Bench to that effect.

And now, the Court is trying to work with counsel to get the case in proper shape for either,

(a) An articulate and meaningful appeal to the United States Supreme Court, or,

(b) An effective way of working out the problem we are faced with,—with an understanding that there is to be no appeal.

Judge Smith: Of course, there is a third alternative. We think that the Court might not grant a stay, pending an appeal.

[fol. 112] Judge Waterman: Oh yes, we,—like women,—probably will have the last word!

Mr. Wick: If I might say, in just general reply to the various suggestions just made, it appears to me, that the plan suggested here is most reasonable and will give everybody an opportunity to have their say and will cause no chaos and no difficulty with the State's legislative machinery, particularly, if we call a Special Session now, and if it should be determined that the special calling of the constitutional convention, I presume that convention would be elected, based upon population, so that it would be representative of one man—one vote. One-vote, one-man, and that would take a little time.

If the Legislature does not call a Constitutional Convention, but sits to reapportion itself, I presume that a period of time of public hearings will be held and I would think that would take some time. And, it seems to me most difficult, to allow either of these procedures at this time.

The reasonable way, and we submit, is, according to the plan of action submitted by the State. Now, I cannot ab-

solutely assure the Court of this, but I believe my clients are in sufficient agreement that there would be no appeal from this.

[fol. 113] Judge Waterman: We aren't afraid of an appeal, we just want to get it fixed so that,—Good Heavens! My Court was reversed in most of twenty-seven times last Term. We have no feeling about it,—

Mr. Wick: Well, all I am trying to say is, that if this procedure is adopted, it appears to me to be the most orderly and best equitable for the State of Vermont and all of its citizens, considering every reasonable possibility.

Judge Waterman: Well, I think you have made a fair statement.

Mr. Wick: And I might say, I have now talked with Mr. MacBride and I would be pleased to make a brief statement in that regard.

Judge Waterman: How many more do you have to talk with?

Mr. Wick: Mr. Parsons, I have not talked to, nor with Mr. Granai, nor Mr. Holmes. I am not sure either of those gentlemen are here.

Judge Waterman: I don't see them. Well, Mr. Parsons announced Friday afternoon, July 10, as every defeated litigant from time immemorial always has announced, "I shall appeal, appeal, appeal."

The mere fact that he made that announcement for the [fol. 114] benefit of the over-anxious press, that isn't particularly impressive, because all defeated litigants do the same thing. But, he made a—he made a later statement that he'd been informed that there was some peculiarities about this case and this Decision, that warranted review by the Supreme Court, in spite of Reynolds and Sims and some others. So, we'd like to get this in shape so that it can be appealed.

Mr. Wick: I have talked with Mr. Parsons, in fact, my clients and I met last Friday afternoon and we were in agreement at that time, including Mr. Parsons, that if the Court gives us until May 31 of '66 in which to reapportion itself, either by the Legislature, or however they are going to do it, or the General or Constitutional Convention, that was perfectly agreeable.

Now, since then, the date has been pushed back to February one and I expect that Mr. Parsons would agree to that, although, I don't know that as a fact. But, I do not understand from my meeting with him the, and the others, that there would be any appeal from them.

Judge Waterman: Well, please don't misunderstand me. This Court is not trying to push client and counsel into a position where they are making some quid pro quo for not appealing. It's simply that I want to get this into shape so [fol. 115] that we all understand each other when this Decree is filed, because the date when the Decree is filed, will govern the time for taking the appeal. And, the content of the Decree, will be part of the matter involved in the appeal, as well as the Opinion of the Court. And, we have cooperated so well before, I felt we might be able to do it now.

As I take it, then, that there are no stipulations signed? Is that right?

Mr. Crispe: (Nodding affirmatively)

Judge Waterman: And I take it, Mr. McNamara, that you do not care to make any presentations and I probably wouldn't let you if you did care to.

Mr. McNamara: The only thing I care to make was that we agreed with the plan in general, but we disagree with the time schedule.

Judge Waterman: All right.

Mr. McNamara: Later, I expect there may be some discussion in the form of a Decree and there is one other matter we feel should be made a part of the Decree and that is having to do with future reapportionment that should be inherent in the Decree.

Judge Waterman: Well all right, Mr. Crispe, what's your—do you want Mr. Gibson to continue to talk about the time limits, or, is it clear now? What's your objection to [fol. 116] the proposed time limit, assuming that we look with any kind of favor upon the rest of it?

Mr. Crispe: Your Honor, I might say at the outset, that I have clients, too, and I haven't managed to keep my client somewhat under control. He wanted me to present to this Court, a plan this morning, for the immediate adoption by

this Court, of the plan, and a directive by this Court to the Legislature, and all sorts of injunctions.

Now, frankly, I haven't been able to control Mr. Buckley to the point where I have said to him, and I may be wrong, Your Honor,—

Judge Waterman: No, well, I asked Mr. Wick to make sure he knew what his clients' intentions were. Remember now, you improved in the Honorable James E. Fitzpatrick. Have you discussed this with him?

Mr. Crispe: No, I haven't.

Judge Waterman: All right, you'd better.

Mr. Crispe: But, I have taken the position, and I may be wrong, that if the Legislature is given an opportunity to vote on reapportionment, that in the end, the logic and sobriety will prevail and that we will not have an appeal in this case.

Judge Waterman: I don't care about the appeal.

[fol. 117] Mr. Crispe: I know you don't, but I do, Your Honor, because I've been working "gratis" and I don't want to go to the Supreme Court working "gratis," and I'd like to get rid of this case at this time.

(Laughter)

Now, I feel that—I feel that the Governor's plan is a reasonable proposal, except, that I feel at the time on it. should start immediately after the General Election.

I would recall very vividly, Your Honor, when we started this case, that you indicated to us that you wanted this case to be tried in a lawyer-like fashion and that you did not want politics injected into the case and I have tried to keep politics out of it.

Judge Waterman: This deals with basic human rights.

Mr. Crispe: That's right, sir.

Judge Waterman: Basic civil rights, and has nothing—unfortunately, or fortunately, people who are interested in basic rights of citizens in this area, are also usually people interested in processes of government and perhaps personally, in the holding of office. But, this case has been well within the tradition of Vermont, been so conducted today.

[fol. 118] No one here can be prouder than I, that Vermont is the first group of individuals,—hardly call it either

a nation or a colony or a State at that time—that granted universal suffrage without religious, property, or other qualifications, and it is well within the tradition of the State that that tradition should be preserved. And, that everybody in the State should have an equal right to vote and have his vote weighted equally. And so far, we have proceeded very well, as this case has progressed in the form of a civil rights political rights Freeman's Rights case, and not as a matter of Party politics,—and I appreciate the efforts that everyone has been making in that regard.

Mr. Crispe: Thank you, Your Honor, and I might say that that is one of the reasons why we have not adopted a Special Election to be called before the elections this year. We do,—it is my position, that we do not want to make the issue of reapportionment a political issue, and it is for that reason that I indicated to my clients that I approved of the Governor's plan, not to take any action until after which, in effect, what it amounts to, until after the elections and then, the first order of business should be, as Your Honor has indicated, that this matter of reapportionment would take place.

[fol. 119] Now, I feel that the,—either the Court should order a Special Election, after our elections are over with, and, or, indicate as the Court has said, that the only business that this Legislature can conduct, in 1965 in January, the only business, is that of reapportionment. And then, if it should dissolve itself until this new House and Senate takes their oath in the Seat.

Now I might say, Your Honor, that I am very much disturbed about these delaying tactics. We have, I believe, pending in the Congress, a congressional or a constitutional amendment. I'm not going to bring this out,—and it is my opinion that there shouldn't be any delay in this case so that an unconstitutional Legislature can try to pass an amendment to the Federal Constitution to keep themselves in office. I don't want to see that happen.

Judge Waterman: No, I'm glad you've seen through that, too. It wouldn't disturb me a bit if the Legislative,—if a Constitutional Amendment in the Constitution of the United States were submitted to the current Vermont Leg-

islature. Obviously, it would have no authority to either adopt or reject.

Mr. Crispe: That's exactly my feeling, Your Honor. So that it is my feeling that either there should be a General Election here, after, or rather Special Election Referendum [fol. 120] on this issue after the general election, or, the first order of business should be the reapportionment by the Legislature itself.

I advocate this, because I know that I should be here and I should say reapportion today, enjoin,—and I should be praying for the relief that I asked for in my original Complaint, Your Honor, but I feel that there will be an immediate appeal if this were done, and perhaps, Your Honor doesn't feel—

Judge Waterman: Well, I think that if there should be no immediate appeal, if there is any possibility of this Legislature passing taxes or bonds, or voting on proposed constitutional amendments, or electing superior or supreme justices, or any of these things which the Legislatures are supposed to do,—

Mr. Crispe: But, I feel,—

Judge Waterman: —and do, under the Vermont Constitution.

Mr. Crispe: Yes, it is only my belief that I think that this Legislature would reapportion itself if it were given the opportunity.

The question is, "when,"—and I think immediately after the general elections of this year as possible and certainly, as the only order of business in the next session of the [fol. 121] Legislature. Now, we have, Mr. Buckley has—

Judge Waterman: I notice the Press taking all of this down. Please understand that what I say, I say for myself, alone. These are not judicial pronouncements—this is done in connection with the Socratic method which we have all adopted heretofore.

Mr. Crispe: Your Honor,—

Judge Waterman: Take down anything you want to, but it's just me.

Mr. Crispe: As long as Your Honor has mentioned the Press, I think the Press is well aware of the fact that Mr. Arthur Simpson has been working with Mr. Buckley and

myself, on various matters for the last two or three years, and as a matter of fact, at some petitions that were filed by Mr. Simpson not too long ago.

Mr. Simpson's plan of reapportionment, Your Honor, is Mr. Buckley's plan of reapportionment. Mr. Buckley wants me to offer the Simpson plan of reapportionment as evidence in this case, with the hope that if the Court is required, itself, to make an Order for Reapportionment, because of the Legislature failing to do so, that it will adopt the Simpson plan. I would like to mark this as an Exhibit, Your Honor.

[fol. 122] Judge Waterman: Well, any exhibits that are introduced today would have to be a Court Exhibit, I'd expect, rather than—or other than your proposed Decree, I would think. Let me see what it is.

(Document Handed to Judge Waterman)

Well, we will reserve on this. I am treating it as a Court Exhibit until we have had an opportunity to look at it.

Mr. Crispe: All right, Your Honor.

Judge Waterman: What about this time business?

Mr. Crispe: Now, in connection with the plan of the Governor, Your Honor, it is our position that his plan should be adopted, but in any event, the session, the next session of the Legislature should put that plan into effect as its only business. This is our position.

We feel that in Vermont, at least I do, and I speak for myself, that if the Legislature is given an opportunity to pass upon this, I think that they will realize every day, that the members of the Legislature, are going to realize that this is a Decision, not only this Court's, but it is supported by the precedent of the U.S. Supreme Court, and I think that Vermonters will respect the law. That is my feeling about it.

[fol. 123] Now, Your Honor, I would like to ask for a little opportunity, I might say, to allow Mr. Thomas, who has worked so hard with me in the preparation of the case originally, and the presentation of the evidence, and the filing of the Brief, with this Court, to say just a few words in connection with the law as he sees it, applicable to the issues.

Judge Waterman: Do you have any proposed Decree for us, Mr. Crispe?

Mr. Crispe: I have not prepared a Decree, Your Honor, because of the fact that I was not sure whether the Governor's plan would be adopted. I have reservations to it, as I indicated, and I didn't prepare a Decree in deference from the Governor.

Judge Waterman: All right, Mr. Thomas? I know you know what the hearing is going to be.

Mr. Thomas: May it Please the Court, I am not quite sure what Mr. Crispe wanted me to present in the way of law. I think the questions of the Court and the points that have been discussed already, indicates that the law is well known to everyone at the moment. I have nothing to offer.

Mr. Crispe: That is a good speech.

Judge Waterman: Thank you. All right, now, what is your alternative plan, Mr. Gibson: Oh, does anyone wish [fol. 124] to say anything more about the proposed plan,—the so-called Governor's Plan? Are you acquainted with the so-called "Governor's Plan?"

Mr. MacBride: May it Please the Court?

Judge Waterman: Are you acquainted with it?

Mr. Wick: If it Please the Court, I had an opportunity to speak to Mr. MacBride. I didn't indicate his comments in the matter and I wonder if he might address the Court?

Judge Waterman: Certainly. I have great respect for Mr. MacBride's constitutional knowledge. Some years ago I received his treatise entitled "Treaties vs Constitution," —I think I received it about 8 or 9 years ago and if he cares to make any statements, I am certainly happy to have his autograph on this book. (Mr. MacBride approached the Bench and autographed a book).

Mr. MacBride: May I speak from here?

Judge Waterman: Yes.

Mr. MacBride: Briefly, to the question of—

Judge Waterman: Are you admitted, by the way, to this Court?

[fol. 125] Mr. MacBride: I don't think so.

Judge Waterman: Well, I think Judge Gibson usually asks some money. What is it, three dollars? (Laughter).

Mr. Murray: It is two dollars for admission and we have a charge of a quarter for filing the application.

Judge Waterman: Well, he's getting three judges. (Laughter).

It should be three dollars. All right, go ahead. I do know that Judge Gibson is very fussy about that, so will you, some time today, have Mr. Murray administer the oath, or something?

Mr. MacBride: Indeed I shall. Simply the matter of time to which I wanted to address myself, and only briefly. Principally for this reason. This is why I suggest the time be extended to Spring of 1966 instead of the earlier date in the Governor's stipulation. It is for, because such a long time in this country we have had a system of representation in the Legislature, not only in this State, but most of the states of the Union, which I regard fundamentally sound.

One House is based on population and the other is based on geographical.

[fol. 126] Now, owing to the recent Decisions of the Supreme Court, you have brought in your ruling to the effect that our Vermont Legislature must have both houses apportioned on a population basis.

I think that after a course of one hundred seventy or more years, the whole system, that the people of this country, and of this State, in justice, ought to have a reasonable opportunity for a year or two, to see if they will not amend the U.S. Constitution to reverse the effect of this. The Supreme Court's Decision and of your Decision, and I too, am cognizant of your remarks earlier, that perhaps you might not think the Legislature had such authority.

I would submit in the first place, that points simply to a good deal of arguments pro and con, if that point of view were adopted, it might well mean that every amendment to the U.S. Constitution which has been adopted since 1866 when the Fourth, or the Fourteenth Amendment was adopted, is invalid.

Therefore, I do think it is an arguable point and I think that, in justice to the people of this State, and any other State, two years ought to be given to see if the State's

Legislature will band together to reverse these two Decisions.

Additionally, if the people should not do that, and the [fol. 127] U.S. Constitution should not be so amended, I would prefer to see the longest possible time for the people of this State to consider possible changes in the existing system.

I think the institutions of man work best when people had, have had a chance to meet and to debate maturely, and with care, the various alternatives which might be open and I think to rush into this in six months, or nine months, that it will change the system which has been so long standing that it can only produce continual strife in the State for, and for those two reasons, the possibility of amendment of the U.S. Constitution, and if that fails, the desirability of allowing the longest possible period of time in consideration.

I do dissent from the stipulation presented to you earlier, the eighth of May, May 31, 1966. Thank you.

Judge Waterman: What makes you think that any Legislature,—I don't quite understand your position, Mr. MacBride, that this particular Legislature has to be kept in existence in order to vote on a proposed ratification of a proposed amendment to the U.S. Constitution. Can't any Legis—any Vermont Legislature do it?

Mr. MacBride: Indeed, any of them could, but the prop- [fol. 128] osition is to keep—

Judge Waterman: Then we do understand each other. There is no necessity for keeping this one in existence for this purpose. If you—all right now, where were we?

Judge Anderson: We haven't heard the Governor's suggested proviso.

General Gibson: In the alternative, Your Honor, if the Court is going to see fit to go along with this plan that we have presented and feels that more speedy action is necessary, I think what I am going to say has already been voiced here,—

That, in the first place, the Governor still would feel the Special Session is not desirable at this time and we have given him many of the reasons, I believe why it would not be.

But, that means to the Court, to give the 1965 Legislature a reasonable opportunity to reapportion itself and if it fails to do so, then the Governor may be directed to suggest a plan of reapportionment to the Court.

If the Court indicates the reapportionment shall be the only business of the 1965 regularly-elected Legislature, that then, the Legislature will go home and then have special elections, either to reconvene and carry out the rest of [fol. 129] the business that it be at least given the opportunity to pass such legislation as may be essential and necessary to carry out and continue the essential functions of State Government between the time of the regular 1965 Legislature adjournment, and taking of office of any new Legislature following the special elections.

Then, if reapportionment is made by Court Order, that reapportionment shall be temporary and effective only until such time as the General Assembly adopts reapportionment, or otherwise reapportions itself, so as to comply with the Constitution of the United States.

The Governor further says that he stands ready to abide, and will follow through, on any Decree issued by the Court, to assure prompt compliance.

So, essentially, that invites again a plea of no Special Session, Your Honor, but, that if the Court deems it necessary, then the business, the first business of the Legislature to be to reapportion itself, to carry out the, pass such legislation as may be necessary to carry on State Government, until special elections and the new Legislature can carry on the regular work of this—

Mr. Wick: I would like, just to point out, I would hope the Decree of the Court would not say the "first order of business," were reapportionment, and that it be the only [fol. 130] order of business.

Judge Waterman: Well, I mean, outside of formal organizational matters.

Mr. Wick: There may be other essentials.

Judge Waterman: The Governor's address must be heard.

Mr. Wick: There may be other essential legislation that should be passed that might be delayed that would do great

harm to the State if it could not also be considered at the same Legislature.

Judge Anderson: I was going to ask what that position was based upon. If the Legislature would be—(inaudible)—on what basis it properly,—the incoming Legislature is limited to reapportionment, you mention that the ten—

General Gibson: No, it was my discussion—

Judge Anderson: I know you mentioned it and he picked it up and I assume he thought that was the authority in back of that.

General Gibson: Referring—are you asking me a question?

Judge Anderson: Yes.

[fol. 131] General Gibson: I wasn't sure you were asking me.

Judge Anderson: You didn't mean to say that?

General Gibson: That if the,—some backing for the authority of the Court to put that in the Decree, is that what the question is? All I'm saying is—

Judge Anderson: Do you feel that the Court is limited or not? I mean, the Legislature has to be limited to reapportionment law?

General Gibson: Well, I think it is one of the general equitable powers of the Courts under these circumstances, to determine if in the first instance, whether the elections proceed, if you are going to let pre-elections proceed, then on what basis, as they have indicated, prefer the first plan.

If the Court feels more speedy action is necessary, we feel that this is preferable to the Court insisting on having a Special Session.

Now, that it would be better to have the Legislature come in and reapportion itself, then have a Special Election at that time. But, I think the Government should be given an opportunity to continue. I mean, we've got to have money to provide for Government, in the meantime.

[fol. 132] Judge Anderson: What would be the effect on the Government of Vermont, if the Legislature could not enact, other than deal with other legislative matters?

General Gibson: Well, I suppose then, that the Court would, under this, give the Governor an opportunity to

present a plan to reapportion, then perhaps reapportion, then the Legislature could only operate under reapportionment plan. I suppose it would have to be special elections.

Mr. Wick: If the Court Please, I would like to ask Mr. Foster to make a few remarks in regard to the alternative plan.

Judge Waterman: Very honored to have you do so.

Mr. Foster: May it Please the Court, of course, I am associated with Mr. Wick, in favoring the Governor's plan as agreed to Friday evening, that is submitted to the Court.

Speaking to the alternative plan, however, it seems to me a possibility would be for the Legislature, as the first order of business, after organization, and this certainly necessary other things, perhaps, to call a constitutional convention, and then, having accomplished that, which should be capable of being done in a very short period. Then, to proceed with, in an orderly way, with the regular business of the [fol. 133] session.

Now, I doubt if a Constitutional Convention should be called while the Legislature is in session for the reason that it is quite likely that certain members of the Legislature, would also be members of the Convention, that it would not be practical to have them assert both functions at the same time. But, I do think that it would be possible then for the regular session, that is, the 1965 session, having called the Constitutional Convention in due order, to proceed to stipulate a date, and I won't try to set the date. It might be April first, or something of that sort, for the meeting of the Convention, and then give the time, proper time limits, as approved by this Court, for the Constitutional Convention, to take action.

I merely submit that, as I say, my first choice is the Governor's proposal, but, if this is to be considered, I, as is known to the court, by virtue of the brief which Mr. Wick and I handed in,—we do believe that the Constitutional Convention, is the proper way,—is the best way.

I wouldn't say the only proper way, but it is the best way of handling the constitutional question facing the State.

Then, you would get a true amendment to the Constitution. You would not, do not have what amounts to a Re-[fol. 134] ceivership, under Federal auspices. Thank you.

Judge Waterman: I certainly think that this Court does not wish to act in the capacity of Receiver. If there is any possible way of avoiding it. Any further comments?

Mr. Crispe: Your Honor, I just want to emphasize that my remarks are keeping, of keeping my client under control, who keeps insisting that this Court now order the Legislature apportioned, enjoined, that elections, and who indicates that unless this is done, that the Court order a Special Session to be held in November, the new Legislature to be constituted by December, so that in January, it is ready to do business.

Now, Mr. Buckley wanted to speak to this Court. He is a litigant and I don't know whether he shall speak through me or directly, but, he and I have disagreed on this issue and I regret I have had to bring it out in the open because he wants the elections enjoined.

Now, until there is a compliance with the Order, as I understand it,—

Mr. Buckley: Your Honor, can Mr. Crispe's client speak for himself in this regard?

Judge Waterman: All right, Mr. Buckley,—make it short. [fol. 135] Mr. Buckley: There was not, this was not my suggestion at all. (Laughter.)

I mentioned a third possible alternative and that could be, that the Court might reapportion, or set up a Reapportionment Plan, effective for a primary in November and a General Election in December.

As it related to members of the Senate and the House. And then, in January, you would have a duly-constituted, properly-apportioned body in Montpelier, in a position to do with itself, what it chose to do with itself, and if it chose to do nothing, there would be no question of an appeal.

As I understand the recent Supreme Court Decision, as it relates to Colorado, and if it chose to reapportion, it would be a duly-constituted,—not a duly-constituted body, not a mal-apportioned body, but a duly-constituted, properly apportioned body could do as it chose to do, as it related to the problem we now have.

And, I think the Court could order this, if it wished to, and have the general elections as it related to Governor and other State officers, and just have the senators and repre-

sentatives elected at a later date and then could join their brethren in Montpelier on January first.

Judge Waterman: Oh, I see now, Mr. Crispe, we, are [fol. 136] we going to adjourn probably for lunch? It is not the Court's function to tell counsel what their relationship to their clients should be, but, it does seem to me, in view of your differences with Mr. Buckley, you might contact Mr. Fitzpatrick and find out his point of view.

We have to make decisions and that is what courts are for. And, if that is all we have received from anybody to date, is this proposed plan, and do you have some alternative plan?

General Gibson: All I have is a letter to me, Your Honor. I can get this in the form—

Judge Waterman: It is on the record, you read it into the record. Aren't you going to prepare a Decree which at least says a Court declares that the present Congress, present General Assembly of the State of Vermont, is improperly apportioned?

Mr. Crispe: Yes, Your Honor, and if the Court would indicate what else it wants in the Decree, we will have it ready by 1:30. (Laughter.)

Judge Waterman: Well, the Court can't very well do that, but at least we can, you can start in on it, obviously, it seems to me. Is there any further representations to be made here by anyone?

(No response)

[fol. 137] Judge Waterman: All right. Frankly, we haven't received quite the help we had hoped to receive, but then, we are not ungrateful for what you have tried to do. And,—but let us now move to the last item on the agenda.

Does anyone wish to take any exceptions to the facts as found in the Opinion?

Does anyone wish to add, make requests for additional facts?

Again, this relates to a proper record on an appeal.

Mr. Crispe: We have nothing.

Judge Waterman: After all, what I suggested to you, is pretty close to impossible. You can wait until we make some sort of a Memorandum.

Mr. Crispe: Then, draw the Decree?

Judge Waterman: Yes.

Mr. Crispe: Thank you, Your Honor.

Judge Waterman: What about findings of fact? Anybody? That applies to you, Mr. Kidder, or you, Mr. MacBride,—Mr. McNamara?

Mr. Kidder: I didn't hear, if the Court Please.

Judge Waterman: Do you want any additional findings made by the Court, beyond what appeared in my Opinion. [fol. 138] You are satisfied to that extent. We are not talking about the contents of the Decree, nor the Mandate. That was what we have been talking about, but this is just simply, should there be appendices of some sort attached to this Opinion, setting forth the State's population and so on, and so forth, in order to have a better record when it goes up to Washington? That is all I am talking about now.

Mr. Kidder: We have no requests.

Mr. McNamara: We have no requests.

Mr. Gibson: None, Your Honor.

Mr. Wick: None, Your Honor.

Judge Waterman: All right, are you satisfied?

Mr. Crispe: Satisfied, Your Honor.

Judge Waterman: Well, is there anything else?

Judge Smith: I have nothing.

Judge Anderson: No, not a thing.

Judge Waterman: Well, thank you, one and all. The Court will ad—recess and frankly, we are not certain when we will come back, but it might be practical for you counsel to be in touch around 2:00 o'clock.

(This Court then at 12:05 noon, recessed until 2:05 p.m., at which time it was reconvened.)

[fol. 139] Judge Waterman: We think we have arrived, consistent with our faith in the normal operations of God-fearing and law-abiding Vermonters, with a fair disposition of this problem which we all realize, and we up here, particularly, realize, is one of the knottiest, spelled either way you wish to spell "knottiest," that any Court has ever been

faced with. And, we would like to have the successful counsel for the Plaintiffs, draw us an Order to be submitted for our examination,—we do not guarantee that we will take it as submitted,—in line with our thoughts in the matter and from Judge Gibson's Library, I will ask the Court Officer to give Mr. Crispe the Advanced Sheet of 229 Federal Supplement, just received, and call his attention to page 790.

Having in mind, Mr. Crispe, that that belongs to the U.S. District Judge.

Mr. Crispe: Yes, Your Honor.

Judge Waterman: Our Order, in the first portions of it, will substantially, we will suggest, be drafted with the Order on that page and line, which is the present Order now in force in the District of Connecticut, in the case of Butterworth against Dempsey.

The first paragraph of your—the proposed Order would, of course be, that the Senate is invidiously apportioned, and is apportioned in contravention to the Fourteenth [fol. 140] Amendment.

It is also, your second would be, that the House of Representatives is invidiously apportioned in contravention to the Fourteenth Amendment.

You would then, pick out the proper article and section of the Vermont Constitution, which provides for the composition of these Houses and state that those provisions are in contravention of the Fourteenth Amendment.

We will then like to see a Proposed Order, which we may do some tinkering with, perpetually enjoining, Philip Hoff, the Governor of the State and his successors in office; the Secretary of State and his successors in office; all the town clerks presently holding office and their successors in office; all the county clerks now holding office and their successors in office, from doing anything with respect to, or in furtherance of any General Election in the State of Vermont, for the offices of Town representative and County Senator for the General Assembly, that would be normally convened in January 1965.

We would also like to have included for our examination, an extension of that injunction under the following circumstances: You leave that blank for the moment because we are now jumping to something else.

We propose to stay the full force and effect of this injunc-
[fol. 141] tion, until April one 1965, or, until a Mandate from the Supreme Court of the United States has been received, upon,—and you'll find some language to that, Mr. Crispe, on page 791, paragraph 6,—or, until a Mandate has been received from the Supreme Court of the United States upon any appeal or appeals, taken from this Judgment, and this Decree, whichever date may be the later.

There will be no stay provided, at least as we presently think, for the following portions of our Order:

If, by any chance, during this stay,—well, it shouldn't have "by any chance,"—if, because of this stay,—and, of course, the stay will permit the holding of the primary and the holding of the General Election,—the persons elected to the positions of County Senator—offices of County Senator and Town Representative, whoever they may be, and if necessary, probably may have to have the Marshal chase them down between November and January,—are enjoined from transacting any business at the General Assembly in 1965, other than consideration, passage of, adoption by, and promulgation of, proposed,—a Proposed Plan for the apportionment of the General Assembly, that will meet the standards of the equal protection clause of the Fourteenth Amendment.

And, that injunction would also apply to the officers of
[fol. 142] the State. We will retain jurisdiction,—you'll find that—some language to that,—in paragraph 7, on Page 791.

We will retain jurisdiction to any such further orders as may be necessary and proper, and we do not desire to tax anybody with any costs.

Now, I think I have explained the formality of what we want. The effect of what we want is this:

The Order of the Court would enjoin, except for the Stay Order, any further activity toward the election of members of the present—of the General Assembly of 1965. We believe that that would be unfair.

The speaker is not convinced that there is an election "in process." But, my two brothers and the Secretary of State says there is. So, we will rely on that provision of the Supreme Court's Order, saying that there is "an election in process."

So, the election will go on, just the same. Unless,—and it's wide open on this—unless the Governor and other interested parties, desire to call a Special Session of the present 1963 General Assembly, which we've held to be invalidly apportioned, but which, for this purpose, would be,—all right.

Or, unless the Governor, or someone who has that power, [fol. 143] shall call a Constitutional Convention in the meantime.

Or, unless, after the election in November, there is a change of some sort which warrants a different approach by an elected group, different from the present office-holding group which can do something between November and January.

Or, unless the present Governor feels that the populace has spoken in such a way in November, that he would be justified in calling,—not a Special Session of the 1963 General Assembly, but a Constitutional Convention, composed largely of the persons elected in November, who would normally be sitting in January, and, who might want to get things legal, so they could do business in January,—ahead of January—do you see what I mean?

All of these options are open. Now, is there anything else?

Judge Smith: No.

Judge Anderson: No.

Judge Waterman: Well, of course, I think we have made it clear that this is appealable, not only as an injunction order, even though stayed, but also because it is an interim order, under the Rules of the Supreme Court, would require such an appeal to be filed within thirty days. But, so that [fol. 144] all can read, we wish to make clear in our proposed Decree, that not only are we retaining jurisdiction, but that this is an interlocutory order.

Now, we haven't said what we would do if nothing has been done by April one 1965. I don't know as we need to, at this time, say what we are going to do at that time. But, very obviously, the injunction will be in full force. And, we will entertain any suggestions, or, as my Mother used to say to me, "If you want something done, you'd better do it yourself." We will have that power, we think.

Now, the Court, of course, will be open to suggestions at all times, between now and any reasonable date. You should, —how long will you need before you think you can submit to us the Decree for us to work with?

Mr. Crispe: I assume that Your Honors are going back home? I could have this done, perhaps, by tonight. But, I suppose you are going back home, so I will have to mail it to you.

Judge Waterman: Well,—

Mr. Crispe: Or, would you want me to?

Judge Waterman: Well, if you devote careful and meticulous attention to what you submit, you can't do it much faster.

[fol. 145] Mr. Crispe: I don't want to do it faster. I want to be sure—I want an opportunity to talk to Mr. Thomas, too, on this, Your Honor.

Judge Waterman: Well, we'll give you five (5) days.

Mr. Crispe: Oh, yes, that is ample time. That will give me time to submit it to Mr. Thomas in Burlington to get his advice and experience.

Judge Waterman: Well, the Court is all wrapped up, much like the Laocoon statuaries, with these blooming cases. My brothers have one tomorrow in Connecticut, and I have one Monday, in New York. Today is Wednesday. Do you think you could clear it to us by Tuesday?

Mr. Crispe: Yes, Your Honor.

Judge Waterman: That is six days from today.

Mr. Crispe: Yes, Your Honor.

Judge Waterman: That is, we receive it by Tuesday?

Mr. Crispe: Yes, Your Honor.

Judge Waterman: You would have it in the mail Monday?

Mr. Crispe: Yes, Your Honor. We'll do that.

[fol. 146] Judge Anderson: I'm afraid that mine has been going to Hartford. I mean, some of the communications,— I'll be sitting in New Haven next week and the Post Office Box Number 1688, New Haven Seven (7).

Mr. Crispe: Thank you, Your Honor. Now, may I ask—

Judge Smith: I'll be at Hartford, not New York.

Judge Waterman: I'll be in New York on Monday, but prayerfully back in St. Johnsbury on Tuesday.

Mr. Crispe: Mail yours to St. Johnsbury?

Judge Waterman: Well, yes, well, why don't your mail me two (2) copies?

Mr. Crispe: All right.

Judge Waterman: Any questions?

Mr. Crispe: Yes, Your Honor, I have two. I take it from your remarks, sir, that the options which you mention, are merely suggestions that you have made, and that you do not want them incorporated in the Decree, is that right?

Judge Waterman: They are suggestions that not only I have made, but counsel has made and other people have made. I see no need for them to be in the Decree. Taking all the conditions and all the possibilities that you wish we [fol. 147] are flatly staying our order.

Mr. Crispe: Yes, I understand.

Judge Waterman: And, under that Stay Order, the elections will go on.

Mr. Crispe: Yes, sir.

Judge Smith: We are not staying that portion as to an injunction as to persons who are elected.

Judge Waterman: Yes, Judge Smith just mentioned, as I pointed out, we are not staying our injunction on persons who are elected.

Mr. Crispe: I understand.

Judge Waterman: They shan't do any business except this.

Mr. Crispe: That is my next question.

Judge Waterman: Yes, sir.

Mr. Crispe: What happens, if the Legislature passes an apportionment bill, which satisfies the requirements of the Federal Constitution, and do then they adjourn and go out of business, or,—I just don't understand what happens.

Judge Waterman: Well, we are reserving judgment on that. We discussed that.

Mr. Crispe: I see.

[fol. 148] Judge Waterman: We've discussed that. We will see. That doesn't have to be in your order.

Mr. Crispe: I see.

Judge Anderson: We are reserving jurisdiction so at the end of that time, any parties who want to come in and have

the Court look at it, but the point is, what I think it should lead to, is special elections for this new Legislature, so you can get out, or get on with the State's legislative business. By that time, I imagine, there'll be something done.

Mr. Crispe: Thank you.

Judge Waterman: Did you want to ask something, Mr. Attorney General?

General Gibson: Yes, Your Honor, in enjoining the Legislature from doing anything except reapportionment, now, if this seems to expect the special elections after the reapportionment is carried out, I assume that you consider that, as part of this overall reapportionment plan, the Legislature, the legislation taking some action which would permit them to have these special elections which will be required, if it is necessary to have to pass some legislation?

Judge Waterman: Well, I assume so. I don't know. Governors, in my time, have called them without special legislation.

Judge Anderson: Special sessions?

[fol. 149] Judge Waterman: Special elections.

Judge Anderson: Special sessions? Oh, are you talking about special sessions, or, special elections? I don't see any harm in that going into the Decree, as it is contemplated that the Legislature will make provisions—providing, of course, for the special elections.

Judge Waterman: Well, there may be other details. We'll be thinking about them in the meantime. This is not an order which Mr. Crispe should attempt to draw his—

Judge Anderson: No, and I think it's—there's nothing to go before the other parties, nothing to keep them from making suggestions after they get a copy of Mr. Crispe's draft.

Mr. Wick: Yes, I had that question. Are we to receive a copy of his Order, and are we to be given an opportunity to make such suggestions as we think are proper?

Judge Waterman: Well, I don't really know. We can,—What I thought we would do, is this. We would receive from him, Mr. Crispe, and what he has done, and then we would modify, change it, split an infinitive and what-have-you, and then return it to him, perhaps, to serve on five days' notice, or something to that effect.

We are not too certain, Mr. Wick, on that. We discussed [fol. 150] that, also. We do think, that in view of the co-operation which counsel have shown to date in this case, and, in view of setting the date ahead to Monday, and in view of what Mr. Crispe says about sending something to Burlington to Mr. Thomas, that we think you should have the courtesy to show what you are going to submit to us, which, of course, would not be final in any sense of the word, really, to Mr. Wick and to the Attorney General.—

(Conferring with Judge Anderson)

All right, we'll extend the time,—you have until Monday to submit to other counsel what you propose to submit to the Court and other counsel have until Thursday to make suggestions to you, and I assume they will, also,—yes, send them to you, and to us.

So, that makes it July 22, Mr. Crispe. Mr. Crispe has until July 22, 27, to submit his proposed Decree to other counsel of record. At the same time, he will submit it to us.

All right, other counsel have until Thursday, July 30th. sub,—to submit suggestions,—through the 30th, so that we receive them on the 31st.

Judge Anderson: In other words, your suggestion to be —your comments on Mr. Crispe's draft, will be directed to the Court, directly to the Court, with copy to him.

[fol. 151] Judge Waterman: Now, while I'm thinking about it, this occurred to me before, and I want to do it exactly right. But, I didn't wish to embarrass myself, or anyone, by inquiring about it before.

Mr. Foster, do I—I want to change my fly sheet. If I put you in as counsel with Mr. Wick and for Mr. Parsons, or, do I put you in "pro se," along with Mr. Wick for yourself, or, do I put you in both places?

Mr. Wick: Your Honor, "pro se." I think.

Mr. Foster: "Pro se," Your Honor, I think, with Mr. Wick.

Judge Waterman: All right.

Mr. Murray: May we have his address, Your Honor?

Judge Waterman: Derby Line, Vermont. He is a well-known person. What else?

Mr. Crispe: Your Honor, I was just going to inquire,—I think it would be of great help to me if I could order a copy of the minutes of this afternoon's proceedings from Mr. Vesper and I would just wonder whether other counsel would like to have it as long as they are going to have the opportunity to examine the Order that I prepare for the [fol. 152] Decree.

Judge Waterman: Time out.—

Any further questions? Thank you again, for your courteous attention to,—oh, I still have a detail.

In view of our order, I see no advantage to excepting to the Vermont reapportionment proposal by Mr. Simpson, which was offered up as a Court Exhibit and I return it to you.

There was one other Court Exhibit, wasn't there?

Mr. Murray: The plan that the Attorney General submitted was never filed, or submitted as an exhibit.

Judge Waterman: You wish it admitted as an exhibit?

General Gibson: What's that?

Mr. Murray: Plan of Action, no, it is the first one.

Judge Waterman: Do you wish your plan, Mr. Attorney General, filed as an exhibit in this case?

General Gibson: Yes, sir, we do, Your Honor.

Judge Waterman: All right, Court's Exhibit One, will you give an original to the Clerk?

[fol. 153] Mr. Murray: I have the original.

Judge Waterman: All right, it may be admitted as "Court's Exhibit One."

Court stands in recess.

(This trial then ended at 2:30 p.m., 22 July 1964.)

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 154]

COURT'S EXHIBIT #1
7-22-64, H.J.V.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK

v.

PHILIP H. HOFF, GOVERNOR OF VERMONT, and HOWARD E. ARMSTRONG, Secretary of State, et al.

Plan of Action

Now come the defendants, Philip H. Hoff, Governor of Vermont, and Howard E. Armstrong, Secretary of State, by their Attorney, Charles E. Gibson, Jr., Attorney General, and hereby present, pursuant to the decision of this Court, the following suggested plan of action and agree that said plan of action may be included in the decree of this Court:

1. As the 1964 election is already in progress, the Court, using its equity powers, refrains from ordering the 1965 General Assembly to be reapportioned. The 1965 General Assembly shall be elected in accordance with the present system.

2. On or before July 1, 1965, the General Assembly shall reapportion itself or set in motion the machinery to effect reapportionment by other means.

[fol. 155] 3. Such reapportionment enactment or any enacted setting up reapportionment by other means shall be submitted to this Court for approval by July 15, 1965.

4. Reapportionment by means other than legislative enactment, except as provided in paragraph 5, shall be completed by February 1, 1966.

5. If, by July 1, 1965, the General Assembly fails to reapportion itself or set in motion the machinery to effect reapportionment by other means, the Governor may, by August 1, 1965, submit to this Court a plan or reapportionment.

6. If reapportionment by means other than legislative enactment is not accomplished by February 1, 1966, the Governor may, by March 1, 1966, submit to this Court a plan of reapportionment.

7. If none of such reapportionment plans, statutes or enactments is in accord with this decree, then this Court will apportion the General Assembly in accordance with the Constitution of the United States.

8. In any event, reapportionment shall be effective for the 1966 elections. If such reapportionment is made by court order, such reapportionment shall be temporary and shall be effective only until such time as the General Assembly adopts said reapportionment or otherwise reapportions it-[fol. 156] self so as to comply with the Constitution of the United States.

9. The Court shall retain jurisdiction of this cause and shall make such further orders as it deems proper.

Dated at Brattleboro in the District of Vermont, this 22nd day of July, 1964.

PHILIP H. HOFF, Governor of Vermont,
and
HOWARD E. ARMSTRONG, Secretary of State

By .....
/s/ CHARLES E. GIBSON, JR.
Charles E. Gibson, Jr.
Attorney General of Vermont

CERTIFIED TO BE A TRUE AND ACCURATE COPY:

/s/ HERMAN J. VESPER
Herman J. Vesper
Official Court Reporter

[fol. 157] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK, Plaintiffs,

v.

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle, Defendants,

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI, and ROGER L. MACBRIDE, Defendants-Intervenors,

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS, Amici Curiae.

JUDGMENT—August 3, 1964

This cause having been heard October 29-30, 1963 on its merits; and the Court having filed an opinion July 10, 1964 embodying findings of fact and conclusions of law; and

The cause having been further heard July 22, 1964 on the judgment to be entered; it is

Ordered, Adjudged and Decreed:

[fol. 158] (1) Chapter II, Section 18 of the Constitution of Vermont, which provides that the thirty Senators who compose the Vermont Senate shall be apportioned among the several counties of the State so that each county, irrespective of variances in the population of the counties,

shall have at least one Senator, is in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution and is declared to be unconstitutional and void, and

(2) Chapter II, Section 13 of the Constitution of Vermont, which provides that, irrespective of any variances in the population of the towns, each inhabited town in the State may elect one Representative to the House of Representatives, is in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution and is declared to be unconstitutional and void, and

(3) Therefore, subject to the provisions hereinafter appearing, the injunction that plaintiffs have requested restraining the officers of the State and those of the counties, towns and cities charged with the conduct of the elections of members of the General Assembly from proceeding with elections pursuant to the present method of apportionment is granted; and the defendants Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, the Town Clerks of the Towns of Vermont, and the County Clerks of the Counties of Vermont, and their respective successors in office, are perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to said method, and said defendants are further enjoined from certifying or in any other [fol. 159] manner declaring that the results of such nominations or elections are valid or that the General Assembly of the State of Vermont which, if constitutionally elected, would be convened on January 6, 1965, is properly or legally constituted, unless by some other authorized lawful and constitutional method Senators and Representatives are nominated and elected to the Senate and House of Representatives of the State of Vermont pursuant to a reapportionment or redistricting of the Senate and a reapportionment or redistricting of the House of Representatives to be effected promptly, such reapportionment or redistricting of the Senate and reapportionment or redistricting of

the House of Representatives having been done in such manner as to achieve substantially equal weighting of the votes of all voters in the choice of members of the General Assembly as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 6, 1965, provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redictricting, and that the terms of said members shall expire on March 31, 1965.

(4) No action is taken now upon the alternative request of plaintiffs that this court order that elections of Senators [fol. 160] and Representatives be on a state-wide basis; and jurisdiction is retained for the entry of such furtlfer orders as may be necessary and proper hereafter.

Sterry R. Waterman, United States Circuit Judge,
J. Joseph Smith, United States Circuit Judge,
Robert P. Anderson, United States District Judge.

August 3, 1964

[fol. 162]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, et al.,

vs.

PHILIP H. HOFF, Governor of Vermont, et al.

Transcript of Hearing on "Petition to Intervene of Ralph A. Foote, as a defendant-intervenor," and his Petition for other relief before The Honorable Sterry R. Waterman, J. Joseph Smith, Robert P. Anderson, United States Circuit Court of Appeals Justices, at Burlington, Vermont, 2 September 1964.

APPEARANCES:

Honorable Charles E. Gibson, Jr., Attorney General, State of Vt.

Honorable Chester S. Ketcham, Ass't Atty General, State of Vt.

F. Elliot Barber, Esquire, Attorney for Petitioner.

Hilton A. Wick, Esquire, Attorney for Intervenors.

Joseph A. McNamara, Esquire, Attorney for League of Women Voters.

Richard H. Thomas, Esquire, Attorney for Complainant.

Robert Erdmann, Esquire (Unannounced as to appearance).

Raffaele M. Terino, Esquire (Unannounced as to appearance).

Herman J. Vesper, 32 Western Avenue, Brattleboro, Vermont, Official Court Reporter.

[fol. 163] Judge Waterman: Good morning, Gentlemen. We are here to hear a Motion to Intervene on the part of Ralph Foote of Middlebury.

His Prayer is, that he be permitted to intervene as a party-defendant, and he prays for affirmative relief such as the plaintiffs prayed for. Are you ready to proceed?

General Gibson: Yes, Your Honor.

Judge Waterman: Mr. Barber? Let's check and see what counsel are all here. Will you find out, Mr. Murray?

Mr. Murray: Yes, Your Honor. I have Richard H. Thomas, the Third, Hilton Wick, Robert Erdmann, Joseph McNamara, Charles E. Gibson, Jr., Chester S. Ketcham, Elliot Barber, Jr., and Raffaele M. Terino.

Are there any other appearances?

(No response.)

Judge Waterman: Mr. Murray, did you cause notice of this Petition to be delivered to Virginia L'Ecuyer? I notice the Affidavit of Service was on Mr. Roberts who, as all of us know, who have been following this case, was relieved as counsel some time ago.

Mr. Murray: Yes, Your Honor. I did.

Judge Waterman: So that all the other parties have [fol. 164] been notified?

Mr. Murray: Yes, Your Honor.

Judge Waterman: All right. Mr. Barber?

Mr. Barber: May it Please the Court. Our reason for being here is partly, naturally, a question involved as a political one in the sense that whoever and whatever the form of reapportionment is taken, to reorganize the Vermont Government, is definitely, a political question in the sense that it is of—in a higher sense,—that it is a part of the science of Government.

Our position is that the legislative power which has been, in effect, withdrawn from the Vermont Legislature as it is constituted under the existing Constitution,—that the withdrawal of that by its clash with the Fourteenth Amendment, has caused the legislative power to revert to the people.

Judge Anderson: Yes, but what you first have to establish is a standing in this Court,—

Mr. Barber: That's correct.

Judge Anderson: —as a right to intervene?

Mr. Barber: That's correct, Your Honor.

Judge Anderson: Why don't you start with that?

[fol. 165] Mr. Barber: We'll start with that to show our interest as is stated in Mr. Foote's Petition. He has the same sort of interest as other residents and citizens and tax payers, who are already in the case, at their request.

And, the reason why we think that we can assist the Court, not only here, but on appeal, and there has been a Notice of Appeal filed, Your Honor, is this—

Judge Waterman: Are you amending your petitions for intervention so as to take care of that desire, to appear in connection with the appeal?

Mr. Barber: Well, we would think if we were admitted to the proceedings for one,—for,—as a party,—that we will be admitted for all purposes, Your Honor,—if there is any question about it.

Judge Waterman: All right.

Mr. Barber: We have a peculiar situation where the appeal is taken and yet the Court,—this Court,—have reserved jurisdiction. Also, make further orders, and it is under that that we are requesting a change in the Order. I think it boils down,—

Judge Smith: If you have the same sort of interest as others already in the case, how is your present representation inadequate?

[fol. 166] Mr. Barber: Well, I think I can make it very plain to Your Honors. We wholly disagree with what is represented to the Court at the hearing as to the form of equitable relief to be taken, to accomplish the Courts' findings, and that disagreement is, that we think there is a substantial question involved as to whether a Legislature, that is so mal-apportioned, that this Court won't allow it to organize, that that Legislature—

Judge Waterman: Have you read our Order?

Mr. Barber: Yes, I have it right before me.

Judge Waterman: I see nothing in it to prevent the Legislature from organizing.

Mr. Barber: Well, maybe I was,—I'll say that it can't pass a law, except to devise a method of apportionment.

Judge Anderson: But, you are now arguing the merits; you still have to establish your standing, which you haven't done yet.

Mr. Barber: Well, perhaps I don't understand what Your Honor requires.

Judge Waterman: Well, Mr. Foote stands here and says he wants to get into this case. I assume three hundred [fol. 167] eighty-nine thousand other inhabitants of Vermont might be interested in getting into this case. Judge Anderson's inquiry is directed to, "What particular standing does this gentleman of yours have, any different from 'Joe Blotts'?"

Mr. Barber: Well, he has a standing of,—from a community of Middlebury, which is of different size and a different area, as represented by Burlington, which is the largest.

Judge Waterman: Now, just a minute. I checked in Wallington's Vermont before I came in the court room and I don't find the name of "Ralph A. Foote" listed as an officer of the Town of Middlebury,—Officer of the Village of Middlebury,—or of any other Fire District.

Mr. Barber: I didn't say that he was an officer, I said he was a resident and a tax payer.

Judge Waterman: All right, what different position does he have as a resident of Middlebury than a resident of any other of the two hundred forty-six towns unorganized?

Mr. Barber: Well, it is a different community and a different size and it has a different problem, perhaps, than the parties in the case, from Burlington,—

Judge Anderson: Now, on that point, you, in your Brief, which I just got this morning, did not cite the case of Salem [fol. 168] against Dempsey, which is predicated on exactly the claim that you have just stated. The Supreme Court turned that down in June of 1964.

Mr. Barber: You mean that the Legislature could not—could reapportion itself?

Judge Anderson: No, that there was a peculiarity in the Town of Salem and forty odd other towns which differen-

tiated from those that were before the Tribunal and therefore, they should have a right to intervene.

Mr. Barber: Well, I don't say that this man,—this petitioner,—has a right to intervene. We are asking that he be admitted, strictly in the discretion of the Court, for the reason of trying to assist the Court and effecting equitable results for the reasons that are stated, and if Your Honors understood that we felt we had a right to be here,—I have to admit it, it is a matter, I think, within the discretion of the Court,—and I don't think there is any question but what,—in a class suit of this nature,—the Court has the discretion.

Judge Waterman: Yes, if any petitioner can show any reason why we should exercise any discretion in his favor, of course, we would exercise it.

Mr. Barber: Well, we don't feel it is in our favor, Your Honor, we feel that the reason, as suggested by the form [fol. 169] of the Petition, and the change that we would suggest in the Order,—if we were admitted.—And, I can state that very, very, very succinctly, by saying the Order, as now framed, says that the Legislature of 1965, shall not do anything beyond devising of a constitutional method of reapportionment.

Judge Anderson: It is your impression that from the Order of this Court entered, that precluded,—the State of Vermont is precluded,—from holding special sessions—

Mr. Barber: Not,—

Judge Anderson: —of the present Legislature and calling a constitutional convention?

Mr. Barber: No—no, sir,—no, sir, but my point is,—our point is, that there is a legal question under the Fourteenth Amendment, where Vermont has no Constitution. The Constitution does not expressly point a way, except through the time-lock that has been gone,—that there's no express way, under the Vermont Constitution, for the Legislature to initiate a change in, in the Constitution, according to the Constitution itself.

And, we feel, that in the absence of that permission and the procedure by the people of Vermont for reapportioning to the Legislature, that it would be contrary to the Four- [fol. 170] teenth Amendment for this Legislature to ap-

portion itself, either through a constitutional change, or through an unsanctioned change in its organization. Because,—if at least, I say,—we say again,—if it can't pass laws on taxes and otherwise, we think it is a substantial question that it be permitted to reorganize the State Government for the—set the basic form of government for the next five hundred years, or whatever it is.

Since this question is not presented by the Order, as now framed, we think it would be proper to supplement the Order and rule on this question, one way or another. So that, when and if it does go to the Supreme Court, the constitutionality of Amendment where our Constitution has been struck down, that where the effect of the "equal protection clause" on the methods used to effect a constitutional change.

Now, that, I do not think, has been decided, and I think it should be decided. It's an area where I think the Vermont question is unique from the others that have gone down to the Supreme Court.

Judge Waterman: I am sure Mr. Barber, that you will have no difficulty with us. We think it ought to be decided, too, and on page thirty of the record of the Brattleboro hearing, the Attorney,—the present Attorney General and [fol. 171] I, had some conversation about it and he said at that time, I quote: "I'm not prepared to tell the Court at this time that I think it is constitutional under the Vermont Constitution,"—that is, to call a constitutional convention. "I would certainly like to get the advice of the Vermont Supreme Court on that. I don't know it we can get it, but I think that is the reason,"—and I said, "We will abstain."

Certainly the powers of the Vermont General Assembly, insofar as they do not interfere with, contradict, or contravene the rights of persons, preserved under the Fourteenth Amendment of the Constitution of the United States, a subject to be decided by the Vermont Supreme Court, and not by us.

Mr. Barber: That's correct, but—

Judge Waterman: Well, why don't you make your address to the proper tribunal?

Mr. Barber: Well, we think that the effect of the Fourteenth Amendment on the, on the procedure, to devise a constitutional change,—Our Constitution is silent, Your Honor, on an amendment procedure excepting by this time-lock that the Court says cannot stand in the way of change, which we wholly agree with. You take a case like the Alabama case, the Constitution there provided for a House of the Legislature to be representative of the people, and, [fol.172] if they followed their own Constitution, they would not run afoul of the Fourteenth Amendment, and that Constitution had a procedure for reapportionment that the people had written into it and the Legislature had refused to follow. Now, we do not have that situation in Vermont. The Constitution is silent.

Judge Waterman: As to you, so you think that a resident of Middlebury, at this stage of this case, who is not apparently acquainted with all of the discussions we have had relative to constitutional conventions, the powers of the Governor, and so forth, can intervene and tell us what we ought to do, as a matter of law?

Mr. Barber: We have not even suggested that we tell you what to do as a matter of law. We have asked,—we ask that we be admitted as a matter of discretion. We have suggested, Your Honor, that the form of the Order be made more specific as to whether or not the Legislature, if it sees fit to reapportion itself, would be violating the Fourteenth Amendment.

Now, that is a matter for this Court and not for the State Courts of Vermont, and as the Order is now framed, that question would not be reached and the only way it would be reached is if the Legislature proceeded to reorganize itself next January, as the Court contemplates, without going to the people-at-large, and then, we come [fol. 173] back and say we complain of that, Your Honors, because it is violating our rights under the Fourteenth Amendment.

Now, it is to avoid that multiplicity of suits, and to have the whole question decided at once, when it goes to the Supreme Court, where apparently it is going, we ask to come in.

Judge Waterman: Let's get back to what Judge Anderson asked you a while ago. I'll call you "General Barber," because I know you have been an Attorney General, and you're entitled to your titles. Now, what standing does your petitioner actually have?

Mr. Barber: He has none whatsoever, except as a resident and a citizen and a tax payer of the State of Vermont, who has counsel, who are prepared to assist the Court and who have made suggestions, as I have stated, where we think the Order would be more effective, more understandable, and might avoid another round of litigation. If Your Honor will—

Judge Waterman: You don't think that your petitioner is adequately protected by the present Attorney General?

Mr. Barber: I did not say that, and I don't want to be interpreted as suggesting that, but I do think that the transcript—and I have read the transcript also, Your [fol. 174] Honor,—and I think the transcript has suggestions that where the parties before the Court, in arguing the form of justice, of the judgment, felt that the Legislature could reapportion itself, and, it is that question that we disagree with, and it is a question that has not been decided, and we think it is a question that should be decided.

Judge Anderson: Well, the foot note in the Douglas Opinion,—Justice Douglas' Opinion, in re: Baker v Carr, which I think referred to an Iowa case, in effect, said that they assumed that the Legislature had power to reapportion itself.

Mr. Barber: Well, if the foot note said that—I have the Opinion here—I am not going to try to find it, but it was,—I don't know what the Iowa situation was, versus Vermont. I do know this, that in the Sims case, the points decided was that a,—there was a constitutional way for the Legislature of Alabama to reapportion itself.

Judge Anderson: Well, it seems to me, what you are referring to, is exactly the same situation existed in Baker v Carr, which is the effect of real wrong there, was that the Tennessee Legislature failed to live up to Tennessee's own Constitution.

Mr. Barber: That's right, and so, in Alabama.

[fol. 175] Judge Anderson: So, you've got the same thing in Alabama and a number of others. Now, we had that partly in Connecticut, and partly not. And in Vermont,—I think is very comparable to the Connecticut situation. But I,—it seemed to me from what the Attorney General argued last time, he felt that the Legislature had enormous powers. In other words, all the powers of the people, to make constitutional amendments.

Mr. Barber: Well, but they get that through the Constitution itself. There is an Article Four or Five, expressly—

(At this point, Mr. Barber and Judge Anderson were both talking at the same time)

Judge Anderson: —Supreme Court interpretation, the Government structure here in Vermont.

Mr. Barber: Well, I searched for the case that was suggested at the hearing and I do not find it and if I did,—

Judge Anderson: I am not suggesting—

Mr. Barber: —will satisfy me on the point of law that I make,—

Judge Anderson: —we'll not say we are estopping this.

[fol. 176] Judge Waterman: We don't say for a moment that we agree with the present Attorney General, or, that we disagree with the ex-Attorney General.

Mr. Barber: Thank you, Your Honor.

Judge Waterman: We might even say that it is none of our business. But, at this stage,—

Mr. Barber: We think the Fourteenth Amendment is very much secure.

Judge Waterman: I did look up the case which General Gibson cited,—and it has been cited twice since then by the Supreme Court of Vermont.—And, the last time it was cited, was in the case involving the,—when a girl reaches majority, or what-not, and when she is able to marry,—as I remember it,—

Mr. Barber: You see, Your Honor,—

Judge Waterman: —and in Judge Black's brief, he cited some excellent cases with reference to the general residuary power of the people.

I do not understand your Petition,—if we ever do reach the real merits of it,—you ask to be a Defendant and you ask us to put a mandatory injunction upon the Governor of the State, which is certainly something even the petitioners weren't anxious to have done.

Mr. Barber: We ask to change the form of injunction [fol. 177] already in issue. We asked to change the conditions under which it was to be implemented or effected, Your Honor, but we didn't ask for the injunction. The injunction had already been issued. We are not here to say that we think the Court could have done anything else.

The power of the Legislature, according to the express words in the document itself, is, that the legislative powers should be exercised by the House or Senate, and the provisions for constitutional change, the so-called time-lock, Your Honor, are already permitted.

There is an Article Seven, Judge Black's Brief quotes, —in the Constitution,—which confirms the residual powers which we have suggested.—The legislative powers as being in the people, to devise their own means of changing Government. That power is reserved. And, assuming that, we think that the Fourteenth Amendment presents an equal problem to changing Government, as it does, to continuing the Government mal-apportioned—

Judge Waterman: Well, all right, we'll hear from everybody on that issue, because, if there is any confusion about what I said in Brattleboro, I will read from that record. I will also make another speech.

On the issue of standing, the only ground you advanced is, that any citizen of the State who believes that a constitu- [fol. 178] tional convention is the proper procedure and that the constitutional convention can be only properly called by a session of a regularly-elected General Assembly, can intervene in this case.

Mr. Barber: I think, Your Honor limited me but I have said that, as a matter of discretion, that this Court,—

Judge Waterman: No, oh no, I mean that you stand sufficiently on the threshold so that you can even ask us to exercise our discretion.

Mr. Barber: On the,—for the reasons that I have stated, why, we think the Courts' Order should be made more clear, —yes.

Judge Waterman: All right now, have any of you gentlemen filed any papers in this case, either in opposition, or, in favor, or equivocal?

General Gibson: We have filed nothing, Your Honor. We have something to say here, but we have filed nothing.

Judge Waterman: Mr. Wick?

Mr. Wick: No, Your Honor, we have filed nothing. I also have something to say.

Judge Waterman: I am very sorry about your personal problem, at this particular time.

[fol. 179] Mr. Wick: Thank you, Your Honor.

Judge Waterman: Mr. McNamara?

Mr. McNamara: No, I have filed nothing and I have nothing to say, if the Court Please.

Judge Waterman: I didn't hear you.

Mr. McNamara: I say, we have filed nothing and we have nothing to say.

Judge Waterman: All right, before other counsel speak, those of you who have read the Opinion in the case which was filed on July ten, you will note that the Court made reference to the fact, that on the witness stand, Mr. Austin Foster testified with reference to the power that he believed resided in the people, to call a constitutional convention, and he cited a long history in connection therewith.

Professor Nuquist stated that he knew of no way in which the Constitution of Vermont would be amended, other than by the method set forth in the Constitution of the State, and the Court made mention of that conflict of testimony in its Opinion.

To those of you who have read the Order of the Court, after the hearing on the "Enlargment of the Decree," you will observe that there is nothing said, one way or the other, about a constitutional convention. The Court has [fol. 180] neither ordered one, nor prohibited one. You may now speak.

General Gibson: If it Please the Court. We have not before objected to anybody intervening and we don't at this—even at this late date. We do note that the Court did refuse to permit the intervention of Mr. Kidder and the League of Women Voters, but granted them permission to

file a Brief, Amicus Curiae. So, I have nothing, really, to say on the question of intervention. I do have something to say beyond that, as to the relief requested by the Petitioner and I do disagree with General Barber on his view point as to the law as to the powers of the Legislature.

It is not for me to say as to which is the more desirable means of effectuating the order of the Court, whether it be by constitutional convention, or, whether it be by temporary legislation with ultimate amendment under our constitutional procedure, which would reach the people and to be approved by them.

It is only for me to advise the State officials as to what I think are the legal means. I think we have been all over the arguments in terms of what the Court should or should not do and what should be in the Order and all the various arguments were made and of course, Mr. Wick's parties, and Mr. Foster in particular, wanted the Order left open so [fol. 181] there would be room for a constitutional convention and nobody ever disagreed with that.

Judge Anderson: Have you advised anybody, officials in the legislative or otherwise, in the State of Vermont, that they cannot call a constitutional convention?

General Gibson: No, I have not so advised them. I made the same comment at the time I appeared before a legislative commission that I tended to agree with the view that constitutional conventions could be held, but I think that it was,—I couldn't really anticipate what the Vermont Supreme Court was going to do, and would do about it, and that I really would not know how to advise them as to what the Vermont Supreme Court would do on that issue.

My own,—since I appeared before the legislative commission, I have done some more independent research and I have also, of course, read the Brief filed by Mr. Barber and the earlier Brief on this point by Mr. Wick and Mr. Foster and I am pretty well convinced that a constitutional convention could be held.

I still think we would be much better off if, perhaps, after a call of one, some action was brought to take the matter before the Supreme Court, so we knew for sure.

Judge Anderson: Is there any reason—

[fol. 182] General Gibson: There seems to be little, if any

authority opposed to the view that you can, although our situation here is different in many ways from some of the other cases that have decided the constitutional convention could be held.

I think the best case in point, of course, is the one cited by Mr. Wick in the Brief before the Court last October, the Rhode Island case, which is merely an advisory Opinion, but it is a pretty good case in point for our situation.

Judge Anderson: Do I detect a feeling on the part of some, that the legislatures would not have power to make temporary provision for a 1965 Legislature? In other words, the scheme used in some States and in Connecticut, is that the existing Legislature in special session, can redistrict itself temporarily for the ensuing session. That is, say, for 1965, it would be both here and Connecticut, and the constitutional convention meanwhile could go to work to make a permanent arrangement.

General Gibson: Well, I—

Judge Anderson: Now, has that been—

General Gibson: —don't have any such feeling, Your Honor. Apparently, Mr. Barber doesn't feel that the present Legislature, even though its been declared unconstitu- [fol. 183] tionally apportioned, can't be so, because he's asked for a special session to be called. Although he may disagree,—I can't speak for him,—I'll speak for myself.

My view is, as I have stated before, that the Legislature in Vermont has the full inherent power of the people, except as limited by the Constitution. I indicated to the Court where the Vermont cases,—there are a couple more recent ones,—as Judge Waterman pointed out, that I have indicated.

There are several old cases—there are probably at least six cases, where the Supreme Court of Vermont has said this. And in the case of Benjamin vs Park, 50 Vermont 178, the Court said that the State Legislature has all of the law-making power of the people, except as limited by the Constitution.

It seems to me that certainly the people can provide for their make up of their Legislature and there is nothing in the Constitution limiting that, when it has been declared

when those provisions that have been declared null and void by the Court under the Fourteenth Amendment.

So, I think that the Legislature has the power now to enact temporary reapportionment measures or enact the reapportionment measure, that the means,—and it can even enact a temporary measure and then proceed with the con-
[fol. 184] stitutional amendment procedure set forth under our Constitution, or, it can set up a legislation and provide for a call for the constitutional convention. I don't think the constitutional convention is the only way by any means here.

If you take the view that the present Legislature,—and it seems to me Mr. Baker takes,—is taking the view that the Legislature cannot enact any legislation,—because to do so, it being mal-apportioned, it will violate the "equal protection clause."

Well, it seems to me that the important thing is the results of that legislation, the type of reapportionment that is enacted which will be done, of course, and approval of this Court is required, to make sure that it does comply with the "equal protection clause" of the Fourteenth Amendment and once the Court has approved it, I can't see that there is any problem.

If you say that the Legislature is,—cannot reapportion itself, now,—that it has to, because it now has no power to enact legislation, then you are lost forever,—because if a Legislature at least has to provide for calling of the Constitutional convention, and if they can't provide for reapportionment, and it can't pass any legislation that is valid, I don't see how they can even call a constitutional convention.

[fol. 185] Judge Waterman: Just a moment, what legislation are you talking about now, 1963, or 1965?

General Gibson: I was talking about both of them.

Judge Waterman: Well, 1963 is of course, mal-apportioned, but it was legally elected and legally in office. I see no reason why it can't do anything that it wants to do.

General Gibson: I can see a distinction to be made, although, I wasn't making that distinction in my argument. I think that the way that the,—as far as I know, a for in-

stance,—that no decree has even come down in Maryland at the present time. I don't believe any decrees have come down in Virginia; I don't think there's any decrees in Delaware. So that there, they are appearing to be proceeding and I think there are going to be hearings in Delaware on the Decree in September and perhaps in Maryland,—so they are, apparently are, proceeding under their present legislative system. And, as far as I know, the elections are going along and being held.

Maryland,—in the Maryland case, the Maryland Court of Appeals held that their Legislature was unconstitutionally appor—that the House of Delegates was unconstitutionally apportioned, and that the House of Delegates did have the [fol. 186] power, and did go ahead and reapportion itself.

That is, the General Assembly, I suppose, reapportioned the House of Delegates. It was only the question of the Senate that wound up being in the United States Supreme Court.

I think the cases generally, have held that a mal-apportioned Legislature, the legislation that it passes is valid, and the Tennessee case, the Dawes versus Bomar, 322 Federal Second, 445, a 1963 case, the Court said that the laws passed by mal-apportioned legislative bodies was valid and they enunciated the doctrine of avoidance and chaos and confusion but said that this was—had to be a case, had to say that the Legislature can reapportion itself, otherwise, it is never to be done. I think that this is the case in all the cases throughout the country.

Judge Waterman: Well, do you see any need for our changing our order? We just don't get over the desirability.

General Gibson: No, I can't see any need for the Court to change the Order, because the,—well, let me—I want to limit that statement, Your Honor. Yes, in terms of ordering the Governor to call the special session and ordering the Legislature to call the constitutional convention, no. I don't see that the Court should do that. It seems to me [fol. 187] that is going too far; that the Order is broad enough so that the Governor can call a special session and the procedure can be gone through, to call a constitutional

convention if the Legislature saw fit, or enact a temporary legislation, or whatever method was used, so, in terms of that, I don't think there is need for a change.

I would like to throw in at this time, Your Honor, as long as we are here, though, where we really would desire a modification of the order, as again has been requested by Mr. Foote here in one respect which, while I realize that we have made these arguments before in Brattleboro, and before Brattleboro, in filing our Requests for Modification of what we understood the Order was going to be, so it is something the Court has already considered, all our arguments there, but we just feel that we are in an awful bind in the State Government by not being able to pass any legislation in this coming winter, particularly, in terms of not being able to pass appropriation measures.

Judge Anderson: Well, you can eliminate that by calling a special session of the Legislature and setting up temporary, but legal, Legislature, which would have plenary power to legislate anything that it would normally legislate, would have. Now why,—Vermont has that power, why doesn't it do it?

[fol. 188] General Gibson: Call the special session?

Judge Anderson: Well, by some means, yes. Have a temporarily reconstituted Legislature for the 1965 session which would be in compliance with the Fourteenth Amendment.

General Gibson: I think it is a question of practicality, Your Honor.

Judge Anderson: Well,—see, the Court is not responsible for difficulties or road blocks, or—

General Gibson: I think they are certainly considerations which the Court ought to take,—I think these things the Court ought to take into consideration as a practical matter,—that this is a very wrenching proposition to the people in Vermont.—They are going to have to get used to, and for instance, we have Congress in session. I can't imagine any Legislature doing anything while Congress is in session. The Legislature doesn't know what Congress is going to do, whether they are going to delay things, or what the legal effect of things will be,—

Judge Anderson: What is there to prevent their doing it on a conditional basis?—Subject to some Act of Congress?

General Gibson: Well, I suppose there is nothing to pre-
[fol. 189] vent it but I can't think that, as a practical matter, it can ever be done.

Judge Anderson: Of course, they could hold that position for the next hundred years!

General Gibson: Well, I don't think that that position could be,—It could be done, yes, for a Legislature to say they will never do anything,—let the Court reapportion itself, but there is much less likelihood of the Legislature doing that next winter than there is during a political campaign and also with Congress,—not knowing what Congress is going to do. I think that, as a practical matter, it might, —that you will find that a Legislature is apt to do nothing under those circumstances.

For instance, I understand that there is a bill that was passed in the House in Congress, it is now in the Senate, which may provide some Federal funds to States for day care for children,—presumably in cases where mothers are going to be working, or something, and to keep them off from public welfare. I understand. And, the bill in the Senate has been amended to provide for matching funds by the States and the States will not share in these matching funds unless they appropriate money by April first of next year and if the Legislature meets, it can't appropriate money by April first. It seems to me that—

[fol. 190] Judge Anderson: It can, if you reconstitute yourself.

General Gibson: Between then?

Judge Anderson: If they are sufficiently interested in the funds for working mothers, they can reconstitute themselves and pass matching funds. There's nothing in the world to stop them.

General Gibson: Legally, there is nothing in the world to stop them. I think that the Court still has to consider the practical aspects of these things.

Judge Waterman: Do you want us to shorten the time on our Order so you can get legally constituted by April one?

General Gibson: Hardly, Your Honor. I prefer the Court to go back to the requests that we made in Brattleboro.—I guess that is all I have, Your Honor.

Mr. Wick: If the Court Please, we have no objections to the intervention of Mr. Foote as a party here. On the question of the Order itself, we believe the law to be that within the terms of that Order, the Legislature could be called in special session; that it could provide for a constitutional convention. We believe the law is to the effect that a constitutional convention is, perhaps, the best, and certainly a proper way, of amending our Constitution.—[fol. 191] And, to reapportion.

Mr. Foster asked me to advise the Court that he could not be here today because of illness.

We do have a further Memorandum to file,—a short one, —on his behalf, on that specific point.

I find myself in the position of representing clients who do not entirely agree as to the appropriate procedure here. Several do believe that the constitutional convention is proper and the best method. Several believe that the Legislature reapportioning itself either through a special session or in 1965, is the best and proper method. Either method, it seems to us, is proper, based upon our study of the law.

Judge Anderson: You don't think there is anything in this Court's Decree that will prevent the Vermont Legislature from immediately convening a special session and reconstituting itself temporarily for the 1965 session in such a manner as it will be consistent with the Fourteenth Amendment of the Constitution of the United States and will have full power to pass such legislation, as it normally passes?

Mr. Wick: That's correct, Your Honor. There is nothing in the Decree to bar that. I would agree, though, with the Attorney General that the practicalities are such that I [fol. 192] doubt that it is probable.

There is an appeal pending, as the Court has been advised, and I suspect the Legislature, even if called into special session, would wait the outcome of that appeal. And, as the Attorney General advises the Court, I expect the Legislature, if called into special session, would wait

the outcome of the proposed legislation that is now pending in Congress.

We do believe, as we said before, and as the Attorney General has said, it is highly desirable that the Order be modified to permit the 1965 Legislature to consider any legislation that normally our legislatures do consider, and that it be given until July one of 1965 within which to reapportion istelf and to set up a constitutional convention for that purpose.

Judge Waterman: July one, 1965?

Mr. Wick: July one, 1965, yes. We believe the—

Judge Waterman: The information we have received from some of your clients, indicate 1966. I think this has something to do with the original Governor's Conference. Am I right?

Mr. Wick: Yes.

Judge Waterman: Now, you are down to June 30, 1965? [fol. 193] Mr. Wick: No, my position, I think, is consistent with what we said before, to reapportion by July one of 1965, that is, through the Legislature, or, the Legislature setting up a constitutional convention for that purpose by that date, and then we further requested that the convention be permitted to complete its work by February one of 1966, as I recall.

Judge Waterman: That is the original agreement?

Mr. Wick: Yes. We believe the law is clear in the recent Supreme Court Decisions handed down June 16, that the Legislature, even though mal-apportioned, does have the power to correctly reapportion itself. The Maryland case seems to be clear on that and the Virginia case seems to be clear on that, as in each of them there were mal-apportioned legislatures and in each instance, the Supreme Court said that those legislatures may reapportion themselves.

Further, as Judge Anderson has indicated, Justice Douglas' Opinion in Baker v Carr, clearly says that a Legislature, even though mal-apportioned, may enact legislation and is empowered to do so. We would respectfully request though, that the Order be modified as we have suggested, and we believe that if done, there is little question but what [fol. 194] the Legislature will be properly reapportioned within the appropriate time and period suggested.

Judge Waterman: Mr. Thomas, do you have anything to say?

Mr. Thomas: Well, not very much, Your Honor. We are content with the Order as it stands and also have no particular objections to the intervention of Mr. Foote.

Judge Waterman: Don't you think you ought to intervene as a Plaintiff?

Mr. Thomas: I was wondering about that. It seems that what he asks—

Judge Waterman: I mean, the relief he requests is even stronger than the relief you request.

Mr. Thomas: Yes, indeed. But, so far as what we have heard this morning, indicates—

Judge Waterman: He apparently wants reapportionment even more than you do!

Mr. Thomas: It would seem the questions he is seeking to help the Court with, are principally questions of State law and not of Federal law. And, so far as the law which both the Attorney General and Mr. Wick have discussed, goes, concerns the power of the Legislature to apportion itself, we agree completely.

Judge Waterman: Is there any further comment?

[fol. 195] General Gibson: I don't know as this is a concern of the Court, but I guess it is only to me. I am not sure whether Mr. Foote is intervening as an individual or lieutenant governor, and I would sort of like to know. I know it seems to be as an individual and General Barber has argued that point, because I think it makes a difference to me as Attorney General, because the statute says that any actions involving State officials, the Attorney General has supervision of the case. I think it makes a difference as to which capacity. Probably to nobody else.

Mr. Barber: To avoid any question, I'll say again, we are asking to intervene on the discretion of the Court as a person, resident, and tax payer, of Vermont.

We would like to point out a suggestion was, in order to do anything pending an appeal. The only appeal filed so far, as I see it, does not appeal the question as to the basic finding of the Court, that the Legislature is unconstitutionally apportioned, and that the Constitution itself is bad,

and that point is not appealed by the appeal that was filed by Mr. MacBride.

Judge Waterman: That's correct.

Mr. Barber: So that your only question presented by the appeal is the form of effectuating this relief.

[fol. 196] Judge Waterman: That's correct.

Mr. Barber: I don't see where that would be an excuse for the Legislature or the leaders of Vermont to sit back and do nothing, and that the road block right now, actually —this is why,—I think this is a good point in discussion,— I'm sorry to have taken Your Honors' time,—

Judge Waterman: No, no, no, we, in fact we will get into the discussion before we get through, because we think it very valuable, indeed, to have the people of Vermont, residents of all the two hundred forty-six towns, understand what can be done.

Is there anything by any of you?

(No response)

Judge Waterman: All right, I would have to—we discussed this in Chambers and I am speaking for all three of us. I will repeat practically what I said in Brattleboro, but I want it definitely understood, and I am sure Mr. Vesper will prepare a record for anybody, press, or anyone else, that the present Order of this Court, leaves it entirely possible for the Governor of Vermont, to call a special session of the 1963 General Assembly, at any time between now and the time that the powers of that General Assembly died, by [fol. 197] lapse of time. That, of course, if the special session believes it has the power, it, in turn, can call a constitutional convention, setting up the method by which that convention shall be composed, its composition and the subjects which it can discuss.

With reference, parenthetically, to whether a constitutional convention is permissible or proper, within the State of Vermont, this Court takes no position, any more than it took in Brattleboro.

The Governor can call this special session and obviously, outline what he wants the special session to undertake to do.

Again, parenthetically, the Vermont tradition has always been, that even though a special session may have been

called for a special purpose, the General Assembly, having convened, can usually do what it sees fit to do, and is not limited, at least in its judgment and traditionally, also, to what the Governor called it to do.

Under the present Order, the members of the General Assembly, which we have held will be a mal-apportioned one, elected in November, will convene and has until April one, to pass a reapportionment plan and in view of the interest in reapportionment plans which has been shown over the immediate past months, and interest in reapportionment, [fol. 198] which I know from my own reading, has been active throughout this century, among the laiety, and as was testified to in Court, was active among people interested in political life, ever since the State was organized, should not require, in our judgment, the full length of time that we have allowed.

Certainly, the, by the fifteenth of February, let us have in mind that the Order of this Court was handed down on the tenth of July, certainly,—not the Order, the Opinion of this Court, was handed down on the tenth of July and the Order, on the Fourth of August,—certainly, by the fifteenth of February, reapportionment plan or plans, should have been suggested and acted upon by a General Assembly, willing and able to comply with this Court's Order.

Of course, one, parenthetically, has to always admit willingness and get it available for submission to the people of the State, if necessary, prior to the town meetings to be held in March, or, a provision made by that Legislature for the summoning of a constitutional convention, or some other method, so that this Court is informed of a willingness to comply with the Fourteenth Amendment of the United States Constitution, which, under our oath of office, we are required to enforce.

There is absolutely nothing in our Order that prevents many other moves, and I note that three have been made. [fol. 199] One, an appointment of a committee by the Governor, one, a voluntary committee, and still a third committee. And, prior to our Order, there were committees, one of the Legislature, several of the Legal Womens Voters, some of the Farm Bureau, et cetera, working on this problem.

We see no reason why *we* should order the Governor of Vermont to call a special session.

We see no reason why *we* should,—as of this time,—why *we* should lay out a reapportionment plan,—as of this time, and, assuming a willingness to comply with the Order of this duly-constituted Court, we see no reason why all of these problems are not just like the wind,—to be blown away. Saving, and excepting, of course, the one by which a Court, superior to us, is asked to rule upon what we have done. We can't blow that one away.

The Petition to Intervene, is denied, for lack of standing.

(Hearing ended at 10:55 a.m.)

[fol. 200] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 201] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY et al., Plaintiffs,

v.

PHILIP H. HOFF et al., Defendants,
LEROY F. LAWRENCE et al., Defendants-Intervenors,
HARLEY WALTER KIDDER et al., Amici Curiae.

NOTICE OF APPEAL OF DEFENDANT-INTERVENOR ROGER L. MACBRIDE TO THE SUPREME COURT OF THE UNITED STATES —Filed August 29, 1964

I. Notice is hereby given that Roger L. MacBride, one of the Defendants-Intervenors in this cause, appeals to the Supreme Court of the United States from the judgment dated August 3, 1964, and entered August 4, 1964, by the district court of three judges, involving the enforcement and execution of the Constitution and statutes of the State

of Vermont and granting an injunction restraining the action of the Governor and other officers of the State in the enforcement and execution of such Constitution and statutes.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare and certify a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. The complaint, the answer, and all other pleadings.

b. The judgment order.

III. The following questions are presented by this appeal:

a. Was it within the power of the district court to limit the legislation to be enacted by the General Assembly of the State of Vermont, scheduled to convene on January 11, 1965, to the devising of a constitutional method of reapportionment and redistricting?

b. Was it within the power of the district court to decree that the terms of the members of the General Assembly scheduled to convene on January 11, 1965, shall expire on March 31, 1965?

Brattleboro, August 28, 1964.

Ralph Chapman, Attorney for Roger L. MacBride, a Defendant-Intervenor, Address: 67 Main Street, Brattleboro, Vt.

[fol. 202] Proof of Service

I, Ralph Chapman, attorney for Roger L. MacBride, appellant herein, being first duly sworn, state that on August 28, 1964, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties to this action, as follows:

1. On the plaintiffs, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to

their attorneys, A. Luke Crispe, Esquire, 114 Main Street, Brattleboro, Vermont, and Richard H. Thomas III, Esquire, Burlington, Vermont.

2. On the defendants, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to their attorneys, Charles E. Gibson Jr., Esquire, Attorney General of the State of Vermont, Supreme Court Building, Montpelier, Vermont, and Harold C. Roberts, Esquire, South Hero, Vermont.

3. On the other defenants-intervenors, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to their attorneys, Wick, Dinse & Allen, Esquires, and Robert H. Erdman, Esquire, 186 College Street, Burlington, Vermont, and John T. Ewing, Esquire, 86 St. Paul Street, Burlington, Vermont, and Philip A. Kolvoord, Esquire, Essex Junction, Vermont, and F. Elliott Barber Jr., Esquire, 29 High Street, Brattleboro, Vermont, and to Austin T. Foster, Derby Line, Vermont.

4. On Harley Walter Kidder, amicus curiae, by mailing a copy thereof in a duly addressed envelope, with first class postage prepaid, to him at 61 Summer Street, Barre, Vermont.

5. On the Vermont League of Women Voters, amicus curiae, by mailing a copy thereof in a duly addressed envelope, with first class postage prepaid, to its attorney, Joseph A. McNamara, Esquire, 209 College Street, Burlington, Vermont.

Brattleboro, August 28, 1964.

Ralph Chapman, Attorney for Roger L. MacBride, Defendant-Intervenor, 67 Main Street, Brattleboro, Vermont.

United States of America,
District of Vermont, ss.

Subscribed and sworn to before me at Brattleboro on August 28, 1964.

John S. Burgson, Notary Public (My commission expires February 10, 1965).

[fol. 203]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK, Plaintiffs,

v.

PHILIP H. HOFF, Governor of Vermont, HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle, Defendants,

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI, and ROGER L. MACBRIDE, Defendants-Intervenors,

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMAN VOTERS, Amici Curiae.

NOTICE OF APPEAL OF DEFENDANT-INTERVENOR, SAMUEL A. PARSONS, ET AL. TO THE SUPREME COURT OF THE UNITED STATES—Filed September 2, 1964.

I. Notice is hereby given that Samuel A. Parsons, Defendant, and the following Defendants-Intervenors, Leroy E. Lawrence, Erma Puffer, Samuel A. Parsons, Austin T. Foster, Lawrence Franklin, John D. Masterton, Russell Holmes, Stoyan Christowe and Cornelius Granai hereby appeal to the Supreme Court of the United States from the Judgment Order dated August 3, 1964, and filed August 4, 1964 by a District Court of three judges, relating to the operation and enforcement of the Constitution and Statutes of the State of Vermont and granting an injunction restraining the action of the Governor and other State,

County, City and Town officers in the enforcement and execution of the Vermont Constitution and certain Vermont Statutes.

This appeal is taken pursuant to 28 U. S. C. Sec. 1253 [fol. 204] and other appropriate sections.

II. The Clerk of the United States District Court for the District of Vermont will please prepare a transcript of the record in this cause for transmittal to the Clerk of the Supreme Court of the United States, and include in the transcript the following:

a. The Amended Complaint, the Answer of each Defendant and of the Defendants Intervenors.

b. The Opinion of the District Court filed June 10, 1964.

c. The proceedings at the hearing in Brattleboro July 22, 1964, relating to the judgment to be entered.

d. The Judgment Order.

III. The following questions are presented by this Appeal:

a. Was it properly within the power of the District Court to limit the legislation to be proposed, considered and passed or rejected by the General Assembly of the State of Vermont scheduled to convene on January 11, 1965, to the devising of a constitutional method of reapportionment and redistricting for a revision of reapportionment of both Houses of the General Assembly; or was this provision of the Court's order, paragraph (3), an abuse of the equity powers of said Court?

b. Was it within the power of the District Court to decree that the terms of the members of the General Assembly scheduled to convene on January 11, 1965, shall expire on March 31, 1965?

c. Is it within the power of the District Court to reapportion or redistrict the General Assembly of the State of Vermont if the General Assembly scheduled to convene on January 11, 1965, shall fail to do so

within the time so limited and in a manner satisfactory to the District Court?

[fol. 205] George D. Webster, Esquire, 1000 Vermont Avenue, Washington, D. C.; Hilton A. Wick, Esquire, 186 College Street, Burlington, Vermont, Attorneys for the Defendant, Samuel A. Parsons and each of the Defendants-Intervenors.

Proof of Service (omitted in printing).

[fol. 206] [File endorsement omitted]

[fol. 207]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK, Plaintiffs,

v.

PHILIP H. HOFF, Governor of Vermont, HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle, Defendants,

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI, and ROGER L. MACBRIDE, Defendants-Intervenors,

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMAN VOTERS, Amici Curiae.

NOTICE OF APPEAL OF DEFENDANT, PHILIP H. HOFF, ET AL. TO THE SUPREME COURT OF THE UNITED STATES—Filed September 3, 1964

I. Notice is hereby given that Philip H. Hoff, Governor of the State of Vermont, and Howard E. Armstrong, Secretary of State of the State of Vermont, Defendants abovenamed, hereby appeal to the Supreme Court of the United States from the Judgment Order dated August 3, 1964, and filed August 4, 1964, by a District Court of three judges, relating to the operation and enforcement of the Constitution and Statutes of the State of Vermont and granting an injunction restraining the action of the Governor and other State, County, City and Town officers in the enforce-
[fol. 208] ment and execution of the Vermont Constitution and certain Vermont Statutes.

This appeal is taken pursuant to 28 U. S. C., Sec. 1253 and other appropriate sections.

II. The Clerk of the United States District Court for the District of Vermont will please prepare a transcript of the record in this cause for transmittal to the Clerk of the Supreme Court of the United States, and include in the transcript the following:

(a) The Amended Complaint, the Answer of each Defendant and of the Defendants Intervenors.

(b) The Opinion of the District Court filed June 10, 1964.

(c) The proceedings at the hearing in Brattleboro July 22, 1964, relating to the judgment to be entered.

(d) The Judgment Order.

(e) The proceedings at the hearing in Burlington September 2, 1964, pertaining to a Motion to Intervene.

III. The following questions are presented by this Appeal:

(a) Did the Court abuse its discretion in prohibiting the General Assembly from enacting legislation providing for the normal operation of state and municipal government pending a satisfactory reapportionment

of the General Assembly in accordance with the [fol. 209] Order of the Court?

(b) Did the Court abuse its discretion in limiting the term of office of members to the 1965 General Assembly to March 31, 1965?

Charles E. Gibson, Jr., Attorney General of the State of Vermont, State Library Building, Montpelier, Vermont; Chester S. Ketcham, Deputy Attorney General of the State of Vermont, State Library Building, Montpelier, Vermont.

Proof of Service (omitted in printing).

[fol. 211] [File endorsement omitted]

[fol. 212]

IN THE UNITED STATES DISTRICT COURT

FOR THE STATE OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY et al., Plaintiffs,

v.

PHILIP H. HOFF et al., Defendants.

MOTION OF DEFENDANT-INTERVENOR ROGER L. MACBRIDE TO AMEND NOTICE OF APPEAL—Filed October 15, 1964

Roger L. MacBride, one of the defendants-intervenors, moves for leave to amend his notice of appeal by deleting therefrom that portion of Paragraph II, which reads as follows:

"a. The complaint, the answer, and all other pleadings."

Brattleboro, October 14, 1964.

Ralph Chapman, Attorney for Roger L. MacBride, a Defendant-Intervenor, 67 Main Street, Brattleboro, Vt.

Proof of Service (omitted in printing).

ORDER—October 16, 1964

Upon consideration of the foregoing Motion, it is So Ordered.

Stanley R. Waterman, Harold L. Smith, Robert H. Anderson.

New York, New York, October 16th, 1964.

[fol. 213] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 214]

SUPREME COURT OF THE UNITED STATES

Nos. 624 and 625—October Term, 1964

SAMUEL A. PARSONS, Town Clerk of the Town of Hubbardton, et al., Appellants,

v.

T. GARRY BUCKLEY et al.; and

PHILIP H. HOFF, Governor of Vermont, et al., Appellants,

v.

T. GARRY BUCKLEY, et al.

ORDER NOTING PROBABLE JURISDICTION—December 14, 1964

Appeals from the United States District Court for the District of Vermont.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument. The appellants are directed to file their briefs on or before January 2, 1965. The appellees are directed to file their briefs on or before January 15, 1965. These cases are set for oral argument on January 18, 1965. That portion of the judgment of the United States District Court for the District of Vermont which is the subject of these appeals is hereby stayed until further order of this Court.

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In the

Supreme Court of The United States

October Term, 1964

No. 624

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

Appellants

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Appellant-Intervenors

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

HILTON A. WICK
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JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the three-judge Federal District Court for the District of Vermont, dated August 3, 1964, enjoining the legislative activities and shortening the terms of office of the members of the General Assembly of the State of Vermont. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the three-judge Federal District Court for the District of Vermont, not yet reported, is set forth in Appendix A, *infra*. The Judgment of that Court dated August 3, 1964, is set forth in Appendix B, *infra*.

JURISDICTION

This action was instituted by Appellees in the United States District Court for the District of Vermont wherein they alleged that the cause arose under the Constitution of the United States, the Fourteenth Amendment to that Constitution, 42 U.S.C. § 1983, 42 U.S.C. § 1988, 28 U.S.C. § 1343 and 28 U.S.C. § 2201. Appellees claimed that they were denied the right of equal suffrage and that they were denied the equal protection of the laws and due process of the law guaranteed them by the Fourteenth Amendment of the Federal Constitution by virtue of the malapportionment of the bicameral General Assembly of the State of Vermont.

Jurisdiction to review an order granting or denying a permanent or a temporary injunction in a civil action by a district court of three judges is conferred upon this Court by 28 U.S.C. § 1253.

Notice of appeal in this action was filed by MacBride on August 29, 1964 and by the other parties on September 2, 1964.

CONSTITUTIONS AND STATUTES INVOLVED

ARTICLE XIV, United States Constitution

§ 1. Citizens; privileges and immunities; due process; equal protection

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER II, Vermont Constitution

§ 13. Town representation; vacancies

SECTION 13. In order that the freeman of the state may enjoy the benefit of election as equally as may be, each inhabited town in this state may, forever hereafter, hold elections therein and choose each one representative to represent them in the House of Representatives. Provided, however, that the General Assembly shall have the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise.

CHAPTER II, Vermont Constitution

§ 18. Senators; number; qualification; apportionment

SECTION 18. The Senate shall be composed of thirty Senators, to be of the freemen of the county for which they are elected, respectively, who shall have attained the age of thirty years, and they shall be elected biennially by the freemen of each county respectively.

The Senators shall be apportioned to the several counties, according to the population, as ascertained by

the census taken under the authority of Congress in the year 1910, regard being always had, in such apportionment, to the counties having the largest fraction, and each county being given at least one Senator. The Legislature shall make a new apportionment of the Senators to the several counties, after the taking of each census of the United States, or after a census taken for the purpose of such apportionment, under the authority of this State, always regarding the above provisions of this section.

CHAPTER II, Vermont Constitution

§ 38. **Term of senators and representatives**

SECTION 38. The term of office of Senators and Town Representatives shall be two years, commencing on the first Wednesday next after the first Monday of January following their election.

28 U.S.C., § 1343

§ 1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C., § 2201

§ 2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C., § 1983

§ 1983. **Civil Action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., § 1988

§ 1988. **Proceeding in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into

effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Was it properly within the power of the District Court to limit the legislation to be proposed, considered and passed or rejected by the General Assembly of the State of Vermont scheduled to convene on January 6, 1965, (inadvertently referred to as January 11, 1965), to the devising of a constitutional method of reapportionment and redistricting or a revision of apportionment of both Houses of the General Assembly; or was this provision in the Court's Order, Paragraph (3), an abuse of the equity powers of said Court?

(2) Was it within the power of the District Court to decree that the terms of the members of the General Assembly scheduled to convene on January 6, 1965 (inadvertently referred to as January 11, 1965) shall expire on March 31, 1965; or was this provision of the Court's Order, Paragraph (3), an abuse of the equity powers of said Court?

STATEMENT

By Plaintiffs' Amendment to Complaint filed 1963, Appellees, residents, voters and taxpayers of Vermont prayed that a three-judge Court be appointed and that that Court enjoin the Governor of the State of Vermont, the Secretary of State of Vermont, the Town Clerks of the Towns of Vermont and the County Clerks of the Counties of Vermont from engaging in any general election duties as granted them by the

laws and the Constitution of the State of Vermont. Among other things, Appellees asked that three-judge Court declare that Section 13 and Section 18 of Chapter II of the Constitution of the State of Vermont, relating to apportionment of the House and Senate be declared unconstitutional. A group of legislators were granted permission to intervene as Defendant-Intervenors. Others were permitted to submit briefs as *amici curiae*.

Hearing was held on the merits of the Plaintiffs' Amended Complaint on October 29-30, 1963, and on July 10, 1964, the Opinion of the Court containing its findings of fact and conclusions of law was filed. In that Opinion the Court asked that counsel for the parties prepare suggestions for decretal orders. At a hearing before the three-judge Court on July 22, 1964, at Brattleboro, Vermont, various suggestions were presented by counsel. On August 3, 1964, the three-judge Court rendered its Judgment wherein it held that Sections 13 and 18 of Chapter II of the Constitution of the State of Vermont were unconstitutional. The Court further perpetually enjoined the Governor of Vermont, the Secretary of State of Vermont, the Town Clerks of the Towns of Vermont, the County Clerks of the Counties of Vermont, and their respective successors in office from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to the declared unconstitutional provisions of the Constitution of the State of Vermont. The Court did allow that the election now in process may continue, but that the legislators elected to take office January 6, 1965, (inadvertently referred to as January 11, 1965) were to consider only legislation limited to the devising of a constitutional method of reapportionment and redistricting. The Court further held that the terms of the members of both houses which would commence on January 6, 1965, would expire March 31, 1965, notwithstanding that the constitutional term of office is for each member two years. Notices of Appeal were filed as follows: by Defendant-Intervenor Roger L. MacBride on August 29, 1964, by Defendant Samuel A. Parsons and the remaining Defendant-Intervenors on September 1, 1964, and by the remaining Defendants on September 3, 1964.

THE QUESTIONS ARE SUBSTANTIAL

As a general rule of law, the order of a three-judge District Court granting or denying a temporary or permanent injunction will not be disturbed on appeal absent a compelling indication that the three-judge Court abused its discretion in its order. Appellants submit the following facts and contend that in light of the present efforts toward reapportionment in Vermont, the three-judge Court abused its decretion in its Order of August 3, 1964.

1. Both the Senate and House of the General Assembly of Vermont are apportioned in accordance with the Constitution of the State of Vermont.

2. The General Assembly of the State of Vermont, which meets biennally in the odd number years, has never had an opportunity to apportion itself so as to comply with the Judgment of the three-judge District Court of August 3, 1964, as the 1963 General Assembly had adjourned prior to that date.

3. The General Assembly which will be elected on November 3, 1964, will take office on the first Wednesday after the first Monday in January, 1965. By the Constitution of the State of Vermont, the term of office of each member of the General Assembly is two years. By the Judgment of the three-judge District Court of August 3, 1964, the General Assembly elected November 3, 1964, which will take office in January of 1965 is severely limited in its term and scope of activities. Said Order allowed that the General Assembly of 1965 may convene "provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redistricting, and that the terms of said members shall expire on March 31, 1965."

4. The apportionment of both of the Houses of the General Assembly of the State of Vermont will greatly affect all of the citizens of Vermont in innumerable ways. The plan of reapportionment must be the result of intelligent and mature thinking if the result is to be practical and nonviolative of the dictates of the Constitution of the United States and of the recently decided cases. It is imperative that the 246-member House and the 30-member Senate not be hurried or forced into hasty action if justice and equity

are to be components of the reapportionment plan finally approved by the voters of the State.

5. A General Assembly composed of members whose terms extend only from January 6, 1964, to March 31, 1965, and whose first and only legislative action, by the Order of August 3, 1964, may be that of the devising of a constitutional method of reapportionment and redistricting will be a General Assembly unable to adequately serve the inhabitants of the State.

6. Many reapportionment plans are presently being studied by groups and many plans will be submitted to the legislators for consideration. The choice of the most just, equitable and constitutional plan as well as its presentation to the voters for approval will reasonably be a time-consuming process. In addition, the orderly process of the election of the newly apportioned legislature will be time-consuming.

7. Should the members of the General Assembly elected on November 3, 1964, be restricted to consideration of the reapportionment of the General Assembly only, and assuming that the final choice and adoption of a plan takes several months, the following situations may or will occur.

a. The Committee on Appropriations will not be able to fully conduct its hearings and will therefore be unable to properly prepare its appropriation bill, nor will that bill be fully considered and passed. This will result in the various agencies of the State being fundless as of July 1, 1965.

b. No special or emergency appropriation bills will be able to be considered which will also deny the various local and State enterprises and organizations of much needed funds, *e.g.*, the City of Burlington is presently in need of a special school tax increase authority for which must be passed by the legislature.

8. It is possible that the legislature to be elected on November 3, 1964, which will take office on January 6, 1965, will decide that a Constitutional Convention is the most satisfactory method of presenting to the voters a plan for reapportionment. If this method is selected, it will also be a time-consuming process as the procedure for such a method of constitutional amendment is not presently provided for in the Constitution of Vermont. However, precedent is

available as many such Constitutional Conventions were used in the early 1800's in Vermont. Also possible is the calling of a special session by the Governor of the present General Assembly after the general election of November 3, 1964. In all probability though, since the terms of office of the members of the present General Assembly will expire on December 31, 1964, those members will be neither prepared or have time to adequately consider the question of reapportionment before their terms of office expire.

9. This Honorable Court had in mind, we submit, situations akin to those above presented when it, speaking through Chief Justice Warren in *Reynolds* v. *Sims* (1964), ... U.S. ....., 32 L.W. 4535 at 4550 stated:

> "However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in process, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, the court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of State election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirement of the Court's Decree. As stated by Mr. Justice Douglas, in concurring in *Baker* v. *Carr*, 'any relief accorded can be fashioned in the light of well known principles of equity.' "
>
> "And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to Federal Constitutional Requisites in a timely fashion after having an adequate opportunity to do so."

And again in *The Maryland Committee for Fair Representation, et al.* v. *Tawes* (1964), ... U.S. ....., 32 L.W. 4573 at 4578, this Honorable Court speaking through Chief Justice Warren seemed to indicate that reapportionment was primarily a legislative matter to be accomplished in a timely fashion:

> "Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland Courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid State Legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the Courts to do so. However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or other unconstitutional plan."

CONCLUSION

It is respectfully submitted that the three-judge District Court abused its discretion when it enjoined the 1965 General Assembly of the State of Vermont in its legislative activities and reduced the terms of its members from the Constitutional two-year terms to that of slightly less than three months. For the reasons set forth, this Court has jurisdiction of the appeal, and it is submitted that the questions presented are substantial. Probable jurisdiction should be noted and the appeal should be set down for briefing and oral argument on the merits.

Respectfully submitted,

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APPENDIX

Appendix "A"

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Plaintiffs

vs.

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

Defendants

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Defendants-Intervenors

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS,

Amici Curiae

Before:

WATERMAN and SMITH, *Circuit Judges*, and ANDERSON, *District Judge*.

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A. Luke Crispe, Brattleboro; Joseph E. Frank, Burlington; Richard H. Thomas, III, Burlington, *for Plaintiffs.*

Hon. Charles E. Gibson, Jr., Attorney General; Chester S. Ketcham, Deputy Attorney General, *for Defendants Hoff and Armstrong.*

Wick, Dinse & Allen, Hilton A. Wick, of counsel, Burlington, *for Defendant Parsons.*

Harold C. Roberts, South Hero, *for Defendant L'Ecuyer.*

Hilton A. Wick of Wick, Dinse & Allen, Burlington; Robert H. Erdmann, John T. Ewing, Burlington; Philip A. Kolvoord, Essex Junction, *for Defendants-Intervenors.*

Harley Walter Kidder, Barre, *amicus curiae, pro se.*

Joseph A. McNamara, Burlington, *for Vermont League of Women Voters, amicus curiae.*

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Action by plaintiffs, on behalf of themselves and other voters similarly situated, seeking, first, a declaratory judgment that their constitutional rights are impaired by the present apportionment of members in the Vermont General Assembly, both in the House of Representatives and in the Senate, in that in the House one Representative is elected from each organized town and city in the State irrespective of its population, and in that in the Senate fourteen out of thirty Senators are elected from each of the fourteen counties in the State irrespective of the county's population; and second, that the Governor, Secretary of State, a County Clerk, and a Town Clerk, named as defendants, be enjoined from engaging in any general election duties or holding elections for the General Assembly upon a town or county basis until a reapportionment shall have been effected which will not impair plaintiffs' constitutional rights, or, in the alternative, that General Assembly elections be held at large.

WATERMAN, *Circuit Judge:*

On January 22, 1963, the original plaintiffs, T. Garry Buckley, a resident, voter, and taxpayer of the Town of Bennington in Bennington County, and Janette N. Berry, a resident, voter, and taxpayer of the Town of Brattleboro in Windham County, filed their complaint in their own behalf and on behalf of all other persons similarly situated challenging the apportionment of the General Assembly of the State of Vermont. The complaint alleged that by reason of the applicable provisions of the Vermont State Constitution and by reason of the General Assembly's latest Apportionment of State Senators Bill, adopted August 9, 1962,[1] pursuant to said Constitution and the decision interpreting its meaning handed down by the Supreme Court of Vermont on July 19, 1962, *Mikell* v. *Rousseau*, 123 Vt. 139, 183 A. 2d 817, petitioners were denied an equal suffrage with more favorably situated inhabitants of the State and were deprived of the equal protection of the laws and of due process of law under the Fourteenth Amendment to the Constitution of the United States. They also alleged that the United States District Court had jurisdiction under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and under 28 U.S. C. §1343.

The complainants stated the Vermont General Assembly is composed of a Senate of 30 members and a House of Rep-

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[1] V.S.A. Title 17, Chapter 33. Apportionment of State Senators.

[§ 1881. Number to be elected.

Counties may elect senators as follows: Addison, two; Bennington, two; Caledonia, two; Chittenden, five; Essex, one; Franklin, two; Grand Isle, one; Lamoille, one; Orange, one; Orleans, two; Rutland, three; Washington, three; Windham, two; Windsor, three.

This act amended former 17 V.S.A. §1881 in that it granted Chittenden County five senators when that county previously had four, and took away one senator from Rutland County, reducing its representation from four senators to three.

The latest change in apportionment prior to this was made in 1941.

resentatives of 246 members, and summarized the provisions of Chapter II, §13 and Chapter II, §18 of the Vermont Constitution, which provisions we set out herein in full:

> [§ 13. Town representation; vacancies]
>
> SECTION 13. In order that the freeman of the state may enjoy the benefit of election as equally as may be, each inhabited town in this state may, forever hereafter, hold elections therein and choose each one representative to represent them in the House of Representatives. Provided, however, that the General Assembly shall have the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise.
>
> [§ 18. Senators; number; qualifications; apportionment]
>
> SECTION 18. The Senate shall be composed of thirty Senators, to be of the freemen of the county for which they are elected, respectively, who shall have attained the age of thirty years, and they shall be elected biennially by the freemen of each county respectively.
>
> The Senators shall be apportioned to the several counties, according to the population, as ascertained by the census taken under the authority of Congress in the year 1910, regard being always had, in such apportionment, to the counties having the largest fraction, and each county being given at least one Senator.
>
> The Legislature shall make a new apportionment of the Senators to the several counties, after the taking of each census of the United States, or after a census taken for the purpose of such apportionment, under the authority of this State, always regarding the above provisions of this section.

They set out in their complaint detailed population statistics of towns, cities, and counties in the State[2] demon-

[2] The 1960 United States Census was used, and without objection was also used by the witnesses and in the evidentiary exhibits.

strating how they claimed deprivation of their voting rights and requested that a three-judge district court be convened under 28 U.S.C. §§ 2281 and 2284.

The original defendants were Vermont's Governor, Lieutenant Governor, Secretary of State, Speaker of the House of Representatives, and one Ernest W. Gibson, III, as Chairman of a Joint Committee of the 1961 General Assembly charged with investigating and reporting to the 1963 General Assembly any suggested action relative to any reapportionment of the Houses.

Petitioners prayed that these defendants, who it was alleged had responsibilities relative to the conduct of free and fair elections, be enjoined from performing their duties, that the court declare, pursuant to 28 U.S.C. §2201, that Chapter II, Article 13, and Chapter II, Article 18 of the State's Constitution are unconstitutional and invalid as violating the Constitution of the United States, and that

> "The Court enter an order causing the reapportionment of the Representatives and Senatorial Districts of the State of Vermont in accordance with the population of the State and the provisions of the Constitution of the State of Vermont which provides for free and equal election."

and

> "That in the alternative, the Court enter an order directing the conduct of the next election of Representatives and Senators to the General Assembly of the State of Vermont to be on an at-large basis of all the people of the State of Vermont being entitled to vote for all Senators and all Representatives to the General Assembly."

The District of Vermont is a one-judge district and, inasmuch as his son was a named defendant in this action, United States District Judge Ernest W. Gibson, Jr., found it necessary to disqualify himself from participation in the litigation; the only other federal judge in active service resident in the district, U. S. Circuit Judge Sterry R. Waterman, was designated to act in place of Judge Gibson, and a three-judge district court was convened composed of Judge Water-

man, Circuit Judge J. Joseph Smith of the U. S. Court of Appeals for the Second Circuit, and U. S. District Judge Robert P. Anderson, Chief Judge of the District Court for the District of Connecticut.

Motions to dismiss were filed by the defendants, and a hearing thereon was held on April 2, 1963, resulting in the dismissal of the action as to the Lieutenant Governor, the Speaker of the House of Representatives and legislator Ernest W. Gibson, III. Also, it appearing that the plaintiffs might lack standing to maintain, as to each of them personally, that they were invidiously discriminated against under Chapter II, §18 and the Apportionment Bill of 1962, leave was requested by, and granted to, them to file an amended complaint and to summon as an additional defendant the County Clerk of Grand Isle County, a county entitled to one Senator although as of the 1960 U. S. Census having but 2,927 inhabitants.

Other interested citizens of the State, all of whom are members of the House of Representatives of the General Assembly, sought to intervene, their petition was granted, one of them, Samuel A. Parsons, the Town Clerk of the Town of Hubbardton, population 238, was joined by the petitioners as a party-defendant, and a resident, voter, and taxpayer of the City of Burlington, population 35,531, was added as an additional party plaintiff. The amended complaint was then filed and served, praying for the same sort of relief as originally sought but now seeking to restrain the Governor and the Secretary of State, the Town Clerk of Hubbardton and the County Clerk of Grand Isle County from complying with the provisions of the election laws relative to the conduct of elections for membership in the State Senate and House of Representatives[3] and further praying that the court hold unconstitutional, as violative of the Fourteenth Amendment of the United States Constitution, the amending provision

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[3] During the April 2 proceedings the court conducted an extensive informal, but reported, pre-trial proceeding so as to sharpen the issues and make any adjudication a meaningful one. Counsel fully cooperated. Answers to the amended complaint were filed by the end of May and the case set for hearing on July 23, 1963. At the request of petitioners'

of the Vermont State Constitution, Chapter II, §68, the so-called "time-lock" provision, which reads as follows:

> [§ 68. Amending constitution]
>
> SECTION 68. At the fifth biennial session of the General Assembly of this State following that of A.D. 1910, and at the session thereof every tenth year thereafter, the Senate may, by a vote of two-thirds of its members, make proposals of amendment, to the Constitution of the State, which proposals of amendent, if concurred in by a majority of the mem-

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counsel, and upon stipulation, the hearing date was set over and October 29, 1963 was the date chosen.

In the amended complaint the prayers for injunctive relief read as follows:

> "That the Court order and direct a reapportionment of the House of Representatives and State Senate of the State of Vermont in accordance with the present population of the State and said Order to provide that upon failure to comply with its provisions, the defendants be restrained and enjoined from engaging in any general election duties as granted to them by the laws of the State of Vermont and the Constitution of the State and that said restraining order remain in full force and effect until the Order directing reapportionment be complied with."
>
> and
>
> "That the Court in the alternative enter an order directing the conduct of the next election for Representative and Senator to the General Assembly of the State of Vermont to be on an at-large basis, of all the people of the State of Vermont and that the defendants be enjoined from furnishing or receiving forms for nominations, petitions, certificates of elections or holding of elections upon a town or county basis."

Also, there was a prayer that the Court retain jurisdiction "for such other and further relief as may be just, equitable and proper."

bers of the House of Representatives, shall be entered on the journals of the two Houses, and referred to the General Assembly then next to be chosen, and be published in the principal newspapers of the State; and if a majority of the members of the Senate and of the House of Representatives of the next following General Assembly shall respectively concur in the same proposals of amendment, or any of them, it shall be the duty of the General Assembly to submit the proposals of amendment so concurred in to a direct vote of the freemen of the State; and such of said proposals of amendment as shall receive a majority of the votes of the freemen voting thereon shall become a part of the Constitution of this State.

The General Assembly shall direct the manner of voting by the people upon the proposed amendments, and enact all such laws as shall be necessary to procure a free and fair vote upon each amendment proposed; and to carry into effect all the provisions of this section.

On October 29-30, 1963, hearing was had on the merits of the amended complaint.[4]

At its inception one James Fitzpatrick, who had previously requested leave to intervene as a party plaintiff, was granted that leave, and the former complainant having withdrawn and there being no objection to the substitution, he was substituted as the complainant resident, voter, and taxpayer of the City of Burlington; and though leave to intervene as parties was denied to applicants representing the Vermont League of Women Voters and to one Harley Walter Kidder leave was granted them to file briefs as friends of the Court.

Seventy exhibits were admitted into evidence, which dealt with the historical bases for town unit representation in the

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[4] At the conclusion of the hearing, upon request of counsel, November 27, 1963 was fixed as the date when briefs and requested findings of fact were to be filed, and reply briefs and other material were to be filed by December 13. The time for such representations was later extended, after the transcript became available, to January 17, 1964.

State Legislature, with the history of changes in the composition of the Legislature from statehood to the present time, the geography and demography of the state, and matters of like import, and reflected most creditably upon the cooperative endeavors of counsel and litigants to assist the court in every way possible. Plaintiffs produced as witnesses Dr. Andrew E. Nuquist and Dr. Robert S. Babcock, long-time Political Science professors at the University of Vermont, who testified at great length in support of plaintiffs' claims and identified many of the plaintiffs' exhibits. Defendant Parsons' testimony was also lengthy, and, drawing upon his many years as a town officer and as the representative from his town in the General Assembly, he sought to prove by his testimony the importance of the Vermont town in Vermont economic and political life, and to prove that the State Legislature, though heavily weighted in its membership in favor of the smaller communities of the state, was conscious of the needs of all the people of the state.

Evidence was uncontradicted that, contrary to the importance of counties in many states, counties in Vermont are unimportant administrative political subdivisions, and that the county's primary purpose is to serve as a judicial district.

The City of Burlington's representative in the Legislature was permitted to testify that it was his belief that certain defeated legislation at the last Term of the General Assembly would have passed if the Houses had been more equitably apportioned; and intervenor Foster testified, contrary to the testimony of Professor Nuquist, that, from his studies, it was his reasoned belief that the people could be summoned into a constitutional convention and the amending provision of the Vermont State Constitution set forth *supra* could be by-passed by having the members of the convention directly propose to the people amendments to the organic law of the state.

Much of this testimony and many of these exhibits,[4] in

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[4] For instance, Dr. Babcock, testifying for the plaintiffs, introduced into evidence Plaintiffs' Exhibit 5, a map setting forth suggested electoral units for a 150-member House. This exhibit is of little pertinence now. In his suggested

particular the evidence relating to the history of the state, have now become, at this stage of these proceedings, immaterial and irrelevant, for, within the month, the Supreme Court of the United States, speaking through Chief Justice Warren, has held that neither history, nor custom, nor tradition, nor heritage, provide rational bases for justifying the composition of a State Legislature if the membership of the Legislature is not fairly and equitably apportioned to the population of the state, and that in bicameral legislatures both Houses must be so apportioned. The Court held that:

> "... as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."
> *Reynolds* v. *Sims*, 32 U.S. L. Week 4535, 4544 (U.S. June 15, 1964), 84 S.Ct. 1362, 1385.

In the light of this standard so recently received we find that both Houses of the Vermont General Assembly are malapportioned.

At the outset it is clear that the House of Representatives is grossly malapportioned, and that citizens of the state's larger communities are invidiously discriminated against be-

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House, majority control would have vested in representatives elected by only one-third of the State's population, and a House so constituted would not meet the standard set by the decision in *Reynolds* v. *Sims*, 32 U.S. L. Week 4535 (U.S. June 15, 1964), U.S. , 84 S.Ct. 1362, for compliance with the Equal Protection Clause of the Fourteenth Amendment.

It is also of interest that the plaintiffs briefed their case on the proposition that the Equal Protection Clause prevents a state from having a system of unit representation by which one legislator represents more than twice as many constituents as another. In view of the "substantially equal" standard announced subsequently in *Reynolds* v. *Sims*, *supra*, this was a conservative position.

cause of the inequality of representation that results from the provision of the Vermont Constitution that gives each "inhabited" or organized town or city in the state one representative. The one representative from the Town of Stratton represents but 38 people, yet has an equal vote with the one representative elected by the 35,531 people of the City of Burlington. 132,790 persons, more than one-third of the total population of the state of 389,881 live in the cities of Burlington, Rutland, Barre, St. Albans, Montpelier and Winooski and the towns of Bennington, Brattleboro, Springfield and St. Johnsbury, which together have but a total of ten votes in a House of 246 members. When the population of twelve more municipalities, the City of Newport and the towns of Essex, South Burlington, Hartford, Rockingham, Middlebury, Colchester, Barre, Northfield, Windsor, Waterbury and Swanton, are added to the population of the ten municipalities just listed, one finds that in these 22 cities and towns more than one-half of the state's population, 195,692 people, reside—yet, far from having any comparable representation in the House they have but 22 of 246 representatives, or not quite 9 percent of the members of the House. These examples of invidious disparities could be multiplied by citing startling comparison after startling comparison, as, for instance, noting that the total population of the ten least populated towns is 661 souls and that of the ten heaviest populated cities and towns is 132,790, or that the 2,322 inhabitants of the 22 least populated towns have equal representation in the House with the 195,692 persons residing in the 22 heaviest populated municipalities whose inhabitants total more than one-half of the state's population. Voters in 82 towns containing less than 475 inhabitants per town elect 82 House members, or one-third of the membership of the House, although one-third of the total population elects only 10 members, and voters in 124 towns with less than 700 inhabitants per town and less than 12 percent of the state's population elect a majority of that membership while a majority of the people of the state, over 50 percent, elect but 22. And, too, Burlington's one representative represents more people than the 107 representatives from the 107 smallest towns, none of which has a population in excess of 600.

The Vermont Senate is composed of thirty members, no

more, no less, chosen on the basis of counties in proportion to their population, but with each county, irrespective of its population, guaranteed at least one of the thirty.

If the Senate were apportioned exactly according to the state's population of 389,881, each Senator would represent 12,996 persons, or $3^1/_3$ percent of the state's population. The Vermont Senate, as of January 1962, ranked third among all the upper Houses of State Legislatures in representativeness (the percentage of the state's total population necessary to elect a majority of the members of the body), for a majority of the Senators represent 47 percent of the state's population. Even so, the Senate is malapportioned, for the one Senator from Grand Isle County represents but 2,927 persons, or $^7/_{10}$ of 1 percent of the state's people, whereas the one Senator from Orange County represents 16,014 people. Similarly, the one Senator from Essex County represents 6,083 people, or 1½ percent (.0156) of the population of the state. Under the state's Constitution, it is impossible to apportion the Senate in any way which will not result in at least a 5-1 disparity between the largest and the smallest number of people represented per Senator. Inasmuch as the disparity caused by the representation of the two counties of Grand Isle and Essex causes the inhabitants of the 12 other counties to be invidiously under-represented, it follows that the Senate is malapportioned despite its high national ranking for overall representativeness. See, on this point, however, as to the unlikely constitutionality of this representativeness, *Davis* v. *Mann*, 32 U.S. L. Week 4579 (U.S. June 15, 1964), 84 S.Ct. 1453, in which the Supreme Court held that a legislative apportionment plan of the State of Virginia under which 41.1 percent of the population can elect a majority of the Upper House and 45 percent of the population can elect a majority of the Lower House violates the Equal Protection Clause.

In view of the failure of the Legislature to vote to submit to the people proposed amendments to this State's organic law that would rectify these malapportionments, and the failure of the Legislature to take any permissible corrective legislative action, the plaintiffs had no other recourse except that of application to the courts. No initiative procedure is provided for under Vermont law. Therefore, we now turn

to a consideration of the effect of the "time-lock" provisions in Section 68 of the Vermont Constitution, *supra*, and we hold that it does not restrain this Court from ordering that the Vermont General Assembly be reapportioned or restrain action by officers of the State to set in motion machinery to do so by any other means that would not be discriminatory under the Federal Constitution. We hold here that the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution is being violated by the present apportionment and "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Reynolds* v. *Sims, supra*, at 4549, 84 S.Ct. 1362, 1393.

As we have stated earlier in this opinion, footnote 2, *supra*, plaintiffs have requested the Court that it not only declare that the present legislative apportionments violate the Equal Protection Clause but also restrain election officers from proceeding with General Assembly elections until reapportionment is accomplished, or order that the election of all 276 General Assemblymen be on a state-wide basis. At this point we should say and we find that defendant Virginia L'Eucyer is properly representative of all the County Clerks in the State and defendant Samuel A. Parsons is properly representative of all the Town and City Clerks in the State charged with election duties relative to the election of state legislators.

Should we adopt either of these alternatives we would act with great reluctance, for we realize that we would be acting in an area that is an unaccustomed one for judges. Moreover, we are very conscious of the well-known law-abiding characteristics of the independent people of Vermont, and of the justified reputation that the State and its people enjoy for integrity, responsibility, and fairness when a course of action is required to be followed. Therefore, although we declare that both Houses of the General Assembly are so apportioned that their composition violates the equal protection of the laws to all voters in a most fundamental way, in that substantially equal representation is denied to all voters in the State in the State's deliberative law-making Assembly, we are constrained to delay adopting any remedy until counsel have had an opportunity to appear before us once again with suggested orders for our issuance.

It is our opinion that a reasonable opportunity should be afforded the legislative and executive officials of the state prompty to initiate the means for the voters of the state to effect an equitable legislative apportionment without the necessity of further action by the court. As of now, we take the view that no progress has been made in this area since *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962), despite the palpable injustice of not making progress, because of an understandable desire to await decisions of the United States Supreme Court in the pending cases that were disposed of by that Court on June 15 and June 22, as well as the decision of this Court in this case, and because of a sense of frustration due to the "time lock" provision relative to the frequency within which amendments to the State Constitution could be initiated.

There is no excuse now for any further inaction. Within constitutional standards the people of the State should determine the framework and composition of the General Assembly, the number of its members, and the length of their terms of service, the qualifications for membership, the number, size and boundaries of electoral units, the number of legislators to be chosen from each unit—always having in mind that the seats in each house of a bicameral state legislature in order to meet the constitutional standard must be apportioned so as to provide substantially equal legislative representation for all citizens of all places within the state, and the weight of a citizen's vote cannot be made to depend on where he lives.

Accommodation by the people of Vermont to federal constitutional standards will require a reasonable space of time within which to work out the details of the proposals which will bring the Constitution of the State into conformity with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

To bring about this needed conformity the officers of the State, executive and legislative, are, of course, empowered to act. The overturning of the state's traditional reliance upon the election to the Lower House of the General Assembly of one Representative from each town in the State, each town as a town being an electoral unit, a traditional reliance which antedates the formation of our national Union and the admission of Vermont into it as the fourteenth state, as

well as the tradition of having at least one Senator represent each county, the county being an electoral unit, could be most difficult to accomplish. The transition should be easier than otherwise, however, in view of the fact that not only the Chief Executive and the Secretary of State are parties litigant, but, in addition, ten members of the House of Representatives, which House we have declared to be apportioned in violation of the United States Constitution, are also, at their own request, parties litigant. As such litigants these influential persons are of course subject to the decrees, orders, and mandates of this Court, and we apprehend that the cooperation which the court has received to date from all parties will continue.

We are aware that persons seeking nominations for the Senate or for the House of Representatives at the September primary elections must file their petitions on or before July 29; and we realize that, upon good cause shown, we should consider the proximity of a forthcoming election and the mechanics and complexities of the State's election laws; and that, even though we have found that this General Assembly is invalidly apportioned, we are permitted to act equitably and in accord with general equitable principles to avoid too much sudden disruption of the State's political way of life.

Accordingly we will receive suggestions for decretal orders at a hearing to be held at the U. S. Court House in Brattleboro, Vermont, on the 22nd day of July at 10:30 A.M., and we shall expect counsel to propose and to consider appropriate decrees to execute the decision we have made, and unless the defendants and defendant intervenors choose to default in their duty to proceed with dispatch to correct the present malapportionments we shall expect from them the submission of a plan of action, with a suggested time-table for the plan's execution.

The foregoing opinion contains our findings of fact and conclusions of law, but we shall entertain suggestions for further findings, if counsel care to request any, at the hearing on July 22.

Irrespective of what may be accomplished on July 22, we shall retain jurisdiction of the case, and we point out to counsel and those they represent that, as the Supreme Court of Vermont stated so well in *Mikell* v. *Rousseau*, *supra*, at 123

Vt. 139, 149: "This is not a time for ingenuity, it is a time to be fair."

STERRY R. WATERMAN,
U. S. Circuit Judge
J. JOSEPH SMITH,
U. S. Circuit Judge
ROBERT P. ANDERSON,
U. S. District Judge

Appendix "B"

UNITED STATES DISTRICT COURT

for the

DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Plaintiffs

vs.

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

Defendants

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Defendants-Intervenors

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS,

Amici Curiae

JUDGMENT

This cause having been heard October 29-30, 1963 on its merits; and the Court having filed an opinion July 10, 1964 embodying findings of fact and conclusions of law; and

The cause having been further heard July 22, 1964 on the judgment to be entered; it is

ORDERED, ADJUDGED AND DECREED:

(1) Chapter II, Section 18 of the Constitution of Vermont, which provides that the thirty Senators who compose

the Vermont Senate shall be apportioned among the several counties of the State so that each county, irrespective of variances in the population of the counties, shall have at least one Senator, is in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution and is declared to be unconstitutional and void, and

(2) Chapter II, Section 13 of the Constitution of Vermont, which provides that, irrespective of any variances in the population of the towns, each inhabited town in the State may elect one Representative to the House of Representatives, is in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution and is declared to be unconstitutional and void, and

(3) Therefore, subject to the provisions hereinafter appearing, the injunction that plaintiffs have requested restraining the officers of the State and those of the counties, towns and cities charged with the conduct of the elections of members of the General Assembly from proceeding with elections pursuant to the present method of apportionment is granted; and the defendants Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, the Town Clerks of the Towns of Vermont, and the County Clerks of the Counties of Vermont, and their respective successors in office, are perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to said method, and said defendants are further enjoined from certifying or in any other manner declaring that the results of such nominations or elections are valid or that the General Assembly of the State of Vermont which, if constitutionally elected, would be convened on January 11, 1965, is properly or legally constituted, unless by some other authorized lawful and constitutional method Senators and Representatives are nominated and elected to the Senate and House of Representatives of the State of Vermont pursuant to a reapportionment or redistricting of the Senate and a reapportionment or redistricting of the House of Representatives to be effected promptly, such reapportionment or redistricting of the Senate and reapportionment or redistricting of the House of

Representatives having been done in such manner as to achieve substantially equal weighting of the votes of all voters in the choice of members of the General Assembly as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 11, 1965, provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redistricting, and that the terms of said members shall expire on March 31, 1965.

(4) No action is taken now upon the alternative request of plaintiffs that this court order that elections of Senators and Representatives be on a state-wide basis; and jurisdiction is retained for the entry of such further orders as may be necessary and proper hereafter.

STERRY R. WATERMAN,
United States Circuit Judge
J. JOSEPH SMITH,
United States Circuit Judge
ROBERT P. ANDERSON,
United States District Judge

August 3, 1964

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No. 625

In the

Supreme Court of The United States

October Term, 1964

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

Appellants

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Appellant-Intervenors

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS,

Amici Curiae

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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QUEEN CITY PRINTERS INC., BURLINGTON, VERMONT

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In the

Supreme Court of The United States

October Term, 1964

No. .....

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

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HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS,

Amici Curiae

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

OPINION BELOW

The Opinion of the 3-Judge District Court, District of Vermont, has not yet been reported. The Opinion of the 3-Judge Court is set forth in Appendix "A." The judgment of the 3-Judge Court is set forth in Appendix "B."

JURISDICTION

This suit was brought under the authority of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1983, 42 U.S.C. 1988, 28 U.S.C. 1343 and 28 U.S.C. 2201. It is alleged by the Appellees that they are denied the right of equal suffrage to that which they and others similarly situated are entitled. They further allege that they are denied the equal protection of the laws and due process of law that is guaranteed them under the Fourteenth Amendment to the Federal Constitution. The 3-Judge Court rendered an Opinion which was filed with the Clerk of the District Court of Vermont on July 10, 1964, wherein it was decided that the apportionment of the Vermont General Assembly was in violation of the Fourteenth Amendment. The Judgment of the 3-Judge Court was rendered on August 3, 1964. Notice of Appeal was filed by Intervenor, Roger L. MacBride, on August 29, 1964. Notice of Appeal was filed by Defendant Samuel A. Parsons and the remaining intervenors on September 1, 1964. Notice of Appeal was filed by Defendants Philip H. Hoff and Howard E. Armstrong on September 3, 1964. Jurisdiction to review a judgment of a 3-Judge District Court is conferred on this Court by 28 U.S.C. 1253.

CONSTITUTIONS AND STATUTES INVOLVED

ARTICLE XIV, United States Constitution

[§ 1. **Citizens; privileges and immunities; due process; equal protection**]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER II, Vermont Constitution

[§ 38. **Term of senators and representatives**]

SECTION 38. The term of office of Senators and Town Representatives shall be two years, commencing on the first Wednesday next after the first Monday of January following their election.

28 U.S.C., Chapter 85, §1343

§1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C., Chapter 151, §2201

§2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C., Chapter 21, §1983

§1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., Chapter 21, §1988

§1988. **Proceedings in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States,

shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

QUESTIONS PRESENTED

1. Did the Court abuse its discretion in prohibiting the General Assembly from enacting legislation providing for the normal operation of state and municipal government pending a satisfactory reapportionment of the General Assembly in accordance with the order of the Court?

2. Did the Court abuse its discretion in limiting the term of office of members to the 1965 General Assembly to March 31, 1965?

STATEMENT

On January 22, 1963, the original Plaintiffs, T. Garry Buckley and Janette N. Berry, filed their complaint challenging the apportionment of the General Assembly of the State of Vermont. On April 2, 1963, the Court held a hearing in order to determine Defendants' motion to dismiss. The Court ordered the complaint dismissed as to the lieutenant governor, speaker of the house and legislator, Ernest W. Gibson III. The Court further granted Appellees' motion to amend its complaint by adding Milton L. Hard as a party-plaintiff and Samuel A. Parsons and Virginia L'Ecuyer as party-defendants. James E. Fitzpatrick was later substituted for Milton L. Hard as a party-plaintiff. Leroy E. Lawrence, Erma Puffer, Samuel A. Parsons, Austin T. Foster, Lawrence Franklin, John D. Masterson, Russell Holmes, Stoyan Christowe, Cornelius Granai and Roger L. MacBride were allowed to intervene as defendants. Harley Walter Kidder and the Vermont League of Women Voters were allowed to submit briefs as *amici curiae*.

The Appellees, in behalf of themselves and other voters similarly situated, sought a declaratory judgment that their constitutional rights were impaired by the present apportionment of the Vermont General Assembly. They further sought to enjoin the governor, secretary of state, a county clerk and a town clerk from engaging in any general election duties or holding elections for the General Assembly until

a reapportionment shall have been effected in accordance with the Fourteenth Amendment, or, in the alternative, that elections to the General Assembly be held at large.

On October 29 and 30, 1963, a hearing was held on the merits of the amended complaint. On July 10, 1964, the Court filed with the District Clerk for the District of Vermont an opinion in which it held that the Fourteenth Amendment to the Federal Constitution is being violated by the present apportionment of the Vermont General Assembly. On July 22, 1964, a hearing was held by the Court in order to determine what orders should be included in the judgment.

On August 3, 1964, the Court issued its judgment order. Under the terms of said order, the defendants were "perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont" unless senators and representatives were elected by some constitutional method. The Court did allow the September primary and November general election to be conducted as presently scheduled but did prohibit those elected from enacting any legislation other than devising a constitutional method of apportionment. The Court further ordered that the terms of the members of the General Assembly elected in November of 1964 for a term of two years should expire on March 31, 1965.

THE QUESTIONS ARE SUBSTANTIAL

While recognizing the general principle that the action of a 3-Judge District Court in granting an injunction will not be disturbed on appeal in the absence of showing of abuse of discretion, the Appellants submit that the present case involves abuse of discretion of a most clear and unmistakable nature. In this connection, the Appellants invite this Court's attention, in particular, to the following circumstances:

(1) The House of Representatives of the Vermont General Assembly is and always has been apportioned in accordance with the terms of the Vermont Constitution.

(2) The Senate of the Vermont General Assembly is apportioned in accordance with the Vermont Constitution as interpreted by the Vermont Supreme Court.

(3) The Vermont General Assembly meets biennially each odd numbered year. The Opinion of the 3-Judge Court filed on July 10, 1964, and the Judgment dated August 3, 1964, were made after the 1963 General Assembly had adjourned. Thus, the Vermont General Assembly has never had an opportunity to review its legislative apportionment subsequent to the decision of the Court.

(4) The United States Congress did not adjourn until October 3, 1964. Prior to adjournment of Congress, various bills and resolutions were introduced pertaining to the reapportionment issue. With that situation present, it is almost a certainty that no special session of the Vermont General Assembly would have enacted reapportionment legislation.

(5) The State of Vermont is presently engaged in an extensive election campaign. The serious question of one's rights under the Fourteenth Amendment should not be subjected to being engulfed in partisan politics by way of a special session in the midst of an election campaign for governor, Congress and all state and local offices.

(6) A legislative reapportionment committee has been meeting frequently since the Judgment of the 3-Judge Court. A governor's committee on reapportionment has also been meeting frequently and both committees are reviewing various plans for reapportionment. Many, many plans have been submitted which require time to review by these committees.

(7) It is unlikely that a special session of the "lame duck" 1963 General Assembly would enact reapportionment legislation after their successors have been chosen even if it is assumed that they would have the time to do so prior to the expiration of their terms of office on December 31, 1964. Although most of the plans for reapportionment appear to meet the constitutional test, there is a wide variation in the make-up of districts which will require extensive study by the General Assembly.

(8) If it is assumed that a special session of the "lame duck" General Assembly could enact a reapportionment plan after the general election, there would be little for those elected to the 1965 General Assembly to do under the Court Decree. A special election would have to be held in accordance with the Court's Decree. Under the present law, pri-

mary petitions must be filed not less than forty days prior to the primary election and the general election is held fifty-six days after the primary election. Under any reapportionment plan, it will become necessary for most candidates to campaign in strange districts covering a larger area. This alone would be reason enough for a longer period in which to campaign. At the very minimum, assuming action on the part of the "lame duck" General Assembly after the general election, a new legislature could not be elected until some time in April without completely disrupting the orderly processes of state government and state elections. Thereafter, it would be necessary for the newly elected legislature to organize and review appropriation bills necessary to the enactment of laws appropriating money prior to the end of the fiscal year of June 30, 1965.

(9) Under the Court Decree, the 1965 General Assembly must reapportion by April 1, 1965. Under the orderly processes of elections and under the present law, the election could not be completed until July 5, 1965. As the Decree forbids the enactment of legislation by the 1965 General Assembly and as appropriations have been made only until July 1, 1965, the operation of orderly state government would be completely disrupted.

(10) There are some voters who urge the calling of a constitutional convention by the General Assembly. Even if it is assumed that the General Assembly has the inherent power to call such a convention for the purposes of reapportionment, it is impossible to elect delegates to such a convention, have them act and have voter approval in time to have a new General Assembly meet and enact laws appropriating money for the operation of state government prior to July 1, 1965.

(11) There is a wide variation between 3-Judge Courts throughout the country concerning the time element involved in reapportionment of state legislatures. It is submitted that this question is substantial. The 3-Judge Court has abused its discretion in its Judgment Order under the circumstances of this case.

Chief Justice Warren, speaking for this Court in *Reynolds* v. *Sims* (1964), 32 L.W. 4535; 377 U.S. 533, 12 L.Ed. 2d ..., 84 S.Ct., 1362, commended the action of the 3-Judge Court

in declining further action until the Alabama legislature had been given an opportunity to act.

> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." * * *
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> *Reynolds* v. *Sims, supra,* p. 4550.

This Court in *The Maryland Committee for Fair Representation* v. *Tawes* (1964), 32 L.W. 4573, 377 U.S. 656, 12 L.Ed. 2d ..., 84 S.Ct. 1429, indicated that the Maryland legislature had time to act before the next regular election and that the 3-Judge Court need take no further action unless the legislature refuses to comply with the order.

> "Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan." * * *
>
> *The Maryland Committee for Fair Representation* v. *Tawes, supra,* p. 4578.

No statement and no reasonable inference can be drawn from this Court's decisions in reapportionment cases which would insist that those lawfully holding their seats in the state legislature must have their terms shortened by order of the Federal Court and that the Court order a special election.

Justice Douglas in his concurring opinion in *Baker* v. *Carr* (1962), 7 L.Ed. 2d 663, 369 U.S. 186, 82 S.Ct. 691, stated that equity principles shall apply:

> "The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.[8]

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[8] The recent ruling by the Iowa Supreme court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (*Cedar Rapids* v. *Cox*, 252 Iowa 948, 964, 108 N.W. 2d 253, 262, 263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W. 2d 40) is plainly correct."

Baker v. *Carr*, *supra*, p. 705.

Justice Douglas in *Baker* v. *Carr*, *supra*, cited with approval *Cedar Rapids* v. *Cox* (1961), 108 N.W. 2d 253, 252 Iowa 948, which indicated that the Courts should prevent chaos from resulting in legislative reapportionment cases. Justice Douglas further cited with approval the case of *Magraw* v. *Donovan* (1958), 163 F. Supp. 184, wherein the Court held:

> "* * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.' * * *
>
> It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meet-

> ing in January 1959 has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State."
>
> *Magraw* v. *Donovan*, *supra*, pp. 187, 188.

The *Magraw* case was cited even though in Minnesota the legislature had refused to redistrict in accordance with its own Constitution from 1913 to 1958. In Vermont, on the other hand, the General Assembly is apportioned in accordance with its own Constitution and was not knowingly in violation of the law until the decision of the 3-Judge Court in this case. The Vermont General Assembly is given no opportunity by the 3-Judge Court to enact a new apportionment law and to continue the orderly processes of state government in the interim.

Under these circumstances, the action of the Court below in enjoining the actions of the Vermont General Assembly was arbitrary and unjust and involved a serious abuse of discretion which this Court should properly correct.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

CHARLES E. GIBSON, JR.,
Attorney General.
CHESTER S. KETCHAM,
Deputy Attorney General.

October 1964.

APPENDIX

Appendix "A"

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Plaintiffs

vs.

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

Defendants

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Defendants-Intervenors

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS,

Amici Curiae

Before:

WATERMAN and SMITH, *Circuit Judges*, and ANDERSON, *District Judge*.

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A. Luke Crispe, Brattleboro; Joseph E. Frank, Burlington; Richard H. Thomas, III, Burlington, *for Plaintiffs.*

Hon. Charles E. Gibson, Jr., Attorney General; Chester S. Ketcham, Deputy Attorney General, *for Defendants Hoff and Armstrong.*

Wick, Dinse & Allen, Hilton A. Wick, of counsel, Burlington, *for Defendant Parsons.*

Harold C. Roberts, South Hero, *for Defendant L'Ecuyer.*

Hilton A. Wick of Wick, Dinse & Allen, Burlington; Robert H. Erdmann, John T. Ewing, Burlington; Philip A. Kolvoord, Essex Junction, *for Defendants-Intervenors.*

Harley Walter Kidder, Barre, *amicus curiae, pro se.*

Joseph A. McNamara, Burlinton, *for Vermont League of Women Voters, amicus curiae.*

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Action by plaintiffs, on behalf of themselves and other voters similarly situated, seeking first, a declaratory judgment that their constitutional rights are impaired by the present apportionment of members in the Vermont General Assembly, both in the House of Representatives and in the Senate, in that in the House one Representative is elected from each organized town and city in the State irrespective of its population, and in that in the Senate fourteen out of thirty Senators are elected from each of the fourteen counties in the State irrespective of the county's population; and second, that the Governor, Secretary of State, a County Clerk, and a Town Clerk, named as defendants, be enjoined from engaging in any general election duties or holding elections for the General Assembly upon a town or county basis until a reapportionment shall have been effected which will not impair plaintiffs' constitutional rights, or, in the alternative, that General Assembly elections be held at large.

WATERMAN, *Circuit Judge:*

On January 22, 1963, the original plaintiffs, T. Garry Buckley, a resident, voter, and taxpayer of the Town of Bennington in Bennington County, and Janette N. Berry, a resident, voter, and taxpayer of the Town of Brattleboro in Windham County, filed their complaint in their own behalf and on behalf of all other persons similarly situated challenging the apportionment of the General Assembly of the State of Vermont. The complaint alleged that by reason of the applicable provisions of the Vermont State Constitution and by reason of the General Assembly's latest Apportionment of State Senators Bill, adopted August 9, 1962,[1] pursuant to said Constitution and the decision interpreting its meaning handed down by the Supreme Court of Vermont on July 19, 1962, *Mikell* v. *Rousseau*, 123 Vt. 139, 183 A. 2d 817, petitioners were denied an equal suffrage with more favorably situated inhabitants of the State and were deprived of the equal protection of the laws and of due process of law under the Fourteenth Amendment to the Constitution of the United States. They also alleged that the United States District Court had jurisdiction under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and under 28 U.S. C. §1343.

The complainants stated the Vermont General Assembly is composed of a Senate of 30 members and a House of Rep-

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[1] V.S.A. Title 17, Chapter 33. Apportionment of State Senators.

[§ 1881. Number to be elected.

Counties may elect senators as follows: Addison, two; Bennington, two; Caledonia, two; Chittenden, five; Essex, one; Franklin, two; Grand Isle, one; Lamoille, one; Orange, one; Orleans, two; Rutland, three; Washington, three; Windham, two; Windsor, three.

This act amended former 17 V.S.A. §1881 in that it granted Chittenden County five senators when that county previously had four, and took away one senator from Rutland County, reducing its representation from four senators to three.

The latest change in apportionment prior to this was made in 1941.

resentatives of 246 members, and summarized the provisions of Chapter II, §13 and Chapter II, §18 of the Vermont Constitution, which provisions we set out herein in full:

> [§ 13. Town representation; vacancies]
>
> SECTION 13. In order that the freeman of the state may enjoy the benefit of election as equally as may be, each inhabited town in this state may, forever hereafter, hold elections therein and choose each one representative to represent them in the House of Representatives. Provided, however, that the General Assembly shall have the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise.
>
> [§ 18. Senators; number; qualifications; apportionment]
>
> SECTION 18. The Senate shall be composed of thirty Senators, to be of the freemen of the county for which they are elected, respectively, who shall have attained the age of thirty years, and they shall be elected biennially by the freemen of each county respectively.
>
> The Senators shall be apportioned to the several counties, according to the population, as ascertained by the census taken under the authority of Congress in the year 1910, regard being always had, in such apportionment, to the counties having the largest fraction, and each county being given at least one Senator.
>
> The Legislature shall make a new apportionment of the Senators to the several counties, after the taking of each census of the United States, or after a census taken for the purpose of such apportionment, under the authority of this State, always regarding the above provisions of this section.

They set out in their complaint detailed population statistics of towns, cities, and counties in the State[2] demon-

[2] The 1960 United States Census was used, and without objection was also used by the witnesses and in the evidentiary exhibits.

strating how they claimed deprivation of their voting rights and requested that a three-judge district court be convened under 28 U.S.C. §§ 2281 and 2284.

The original defendants were Vermont's Governor, Lieutenant Governor, Secretary of State, Speaker of the House of Representatives, and one Ernest W. Gibson, III, as Chairman of a Joint Committee of the 1961 General Assembly charged with investigating and reporting to the 1963 General Assembly any suggested action relative to any reapportionment of the Houses.

Petitioners prayed that these defendants, who it was alleged had responsibilities relative to the conduct of free and fair elections, be enjoined from performing their duties, that the court declare, pursuant to 28 U.S.C. §2201, that Chapter II, Article 13, and Chapter II, Article 18 of the State's Constitution are unconstitutional and invalid as violating the Constitution of the United States, and that

> "The Court enter an order causing the reapportionment of the Representatives and Senatorial Districts of the State of Vermont in accordance with the population of the State and the provisions of the Constitution of the State of Vermont which provides for free and equal election."
>
> and
>
> "That in the alternative, the Court enter an order directing the conduct of the next election of Representatives and Senators to the General Assembly of the State of Vermont to be on an at-large basis of all the people of the State of Vermont being entitled to vote for all Senators and all Representatives to the General Assembly."

The District of Vermont is a one-judge district and, inasmuch as his son was a named defendant in this action, United States District Judge Ernest W. Gibson, Jr., found it necessary to disqualify himself from participation in the litigation; the only other federal judge in active service resident in the district, U. S. Circuit Judge Sterry R. Waterman, was designated to act in place of Judge Gibson, and a three-judge district court was convened composed of Judge Water-

man, Circuit Judge J. Joseph Smith of the U. S. Court of Appeals for the Second Circuit, and U. S. District Judge Robert P. Anderson, Chief Judge of the District Court for the District of Connecticut.

Motions to dismiss were filed by the defendants, and a hearing thereon was held on April 2, 1963, resulting in the dismissal of the action as to the Lieutenant Governor, the Speaker of the House of Representatives and legislator Ernest W. Gibson, III. Also, it appearing that the plaintiffs might lack standing to maintain, as to each of them personally, that they were invidiously discriminated against under Chapter II, §18 and the Apportionment Bill of 1962, leave was requested by, and granted to, them to file an amended complaint and to summon as an additional defendant the County Clerk of Grand Isle County, a county entitled to one Senator although as of the 1960 U. S. Census having but 2,927 inhabitants.

Other interested citizens of the State, all of whom are members of the House of Representatives of the General Assembly, sought to intervene, their petition was granted, one of them, Samuel A. Parsons, the Town Clerk of the Town of Hubbardton, population 238, was joined by the petitioners as a party-defendant, and a resident, voter, and taxpayer of the City of Burlington, population 35,531, was added as an additional party plaintiff. The amended complaint was then filed and served, praying for the same sort of relief as originally sought but now seeking to restrain the Governor and the Secretary of State, the Town Clerk of Hubbardton and the County Clerk of Grand Isle County from complying with the provisions of the election laws relative to the conduct of elections for membership in the State Senate and House of Representatives[3] and further praying that the court hold unconstitutional, as violative of the Fourteenth Amendment of the United States Constitution, the amending provision

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[3] During the April 2 proceedings the court conducted an extensive informal, but reported, pre-trial proceeding so as to sharpen the issues and make any adjudication a meaningful one. Counsel fully cooperated. Answers to the amended complaint were filed by the end of May and the case set for hearing on July 23, 1963. At the request of petitioners'

of the Vermont State Constitution, Chapter II, §68, the so-called "time-lock" provision, which reads as follows:

> [§ 68. Amending constitution]
>
> SECTION 68. At the fifth biennial session of the General Assembly of this State following that of A.D. 1910, and at the session thereof every tenth year thereafter, the Senate may, by a vote of two-thirds of its members, make proposals of amendment, to the Constitution of the State, which proposals of amendent, if concurred in by a majority of the mem-

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counsel, and upon stipulation, the hearing date was set over and October 29, 1963 was the date chosen.

In the amended complaint the prayers for injunctive relief read as follows:

> "That the Court order and direct a reapportionment of the House of Representatives and State Senate of the State of Vermont in accordance with the present population of the State and said Order to provide that upon failure to comply with its provisions, the defendants be restrained and enjoined from engaging in any general election duties as granted to them by the laws of the State of Vermont and the Constitution of the State and that said restraining order remain in full force and effect until the Order directing reapportionment be complied with."
>
> and
>
> "That the Court in the alternative enter an order directing the conduct of the next election for Representative and Senator to the General Assembly of the State of Vermont to be on an at-large basis, of all the people of the State of Vermont and that the defendants be enjoined from furnishing or receiving forms for nominations, petitions, certificates of elections or holding of elections upon a town or county basis."

Also, there was a prayer that the Court retain jurisdiction "for such other and further relief as may be just, equitable and proper."

bers of the House of Representatives, shall be entered on the journals of the two Houses, and referred to the General Assembly then next to be chosen, and be published in the principal newspapers of the State; and if a majority of the members of the Senate and of the House of Representatives of the next following General Assembly shall respectively concur in the same proposals of amendment, or any of them, it shall be the duty of the General Assembly to submit the proposals of amendment so concurred in to a direct vote of the freemen of the State; and such of said proposals of amendment as shall receive a majority of the votes of the freemen voting thereon shall become a part of the Constitution of this State.

The General Assembly shall direct the manner of voting by the people upon the proposed amendments, and enact all such laws as shall be necessary to procure a free and fair vote upon each amendment proposed, and to carry into effect all the provisions of this section.

On October 29-30, 1963, hearing was had on the merits of the amended complaint.*

At its inception one James Fitzpatrick, who had previously requested leave to intervene as a party plaintiff, was granted that leave, and the former complainant having withdrawn and there being no objection to the substitution, he was substituted as the complainant resident, voter, and taxpayer of the City of Burlington; and though leave to intervene as parties was denied to applicants representing the Vermont League of Women Voters and to one Harley Walter Kidder leave was granted them to file briefs as friends of the Court.

Seventy exhibits were admitted into evidence, which dealt with the historical bases for town unit representation in the

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* At the conclusion of the hearing, upon request of counsell, November 27, 1963 was fixed as the date when briefs and requested findings of fact were to be filed, and reply briefs and other material were to be filed by December 13. The time for such representations was later extended, after the transcript became available, to January 17, 1964.

State Legislature, with the history of changes in the composition of the Legislature from statehood to the present time, the geography and demography of the state, and matters of like import, and reflected most creditably upon the cooperative endeavors of counsel and litigants to assist the court in every way possible. Plaintiffs produced as witnesses Dr. Andrew E. Nuquist and Dr. Robert S. Babcock, long-time Political Science professors at the University of Vermont, who testified at great length in support of plaintiffs' claims and identified many of the plaintiffs' exhibits. Defendant Parsons' testimony was also lengthy, and, drawing upon his many years as a town officer and as the representative from his town in the General Assembly, he sought to prove by his testimony the importance of the Vermont town in Vermont economic and political life, and to prove that the State Legislature, though heavily weighted in its membership in favor of the smaller communities of the state, was conscious of the needs of all the people of the state.

Evidence was uncontradicted that, contrary to the importance of counties in many states, counties in Vermont are unimportant administrative political subdivisions, and that the county's primary purpose is to serve as a judicial district.

The City of Burlington's representative in the Legislature was permitted to testify that it was his belief that certain defeated legislation at the last Term of the General Assembly would have passed if the Houses had been more equitably apportioned; and intervenor Foster testified, contrary to the testimony of Professor Nuquist, that, from his studies, it was his reasoned belief that the people could be summoned into a constitutional convention and the amending provision of the Vermont State Constitution set forth *supra* could be by-passed by having the members of the convention directly propose to the people amendments to the organic law of the state.

Much of this testimony and many of these exhibits,[5] in

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[5] For instance, Dr. Babcock, testifying for the plaintiffs, introduced into evidence Plaintiffs' Exhibit 5, a map setting forth suggested electoral units for a 150-member House. This exhibit is of little pertinence now. In his suggested

particular the evidence relating to the history of the state, have now become, at this stage of these proceedings, immaterial and irrelevant, for, within the month, the Supreme Court of the United States, speaking through Chief Justice Warren, has held that neither history, nor custom, nor tradition, nor heritage, provide rational bases for justifying the composition of a State Legislature if the membership of the Legislature is not fairly and equitably apportioned to the population of the state, and that in bicameral legislatures both Houses must be so apportioned. The Court held that:

> "... . as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."
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> *Reynolds* v. *Sims*, 32 U.S.L. Week 4535, 4544 (U.S. June 15, 1964), 84 S.Ct. 1362, 1385.

In the light of this standard so recently received we find that both Houses of the Vermont General Assembly are malapportioned.

At the outset it is clear that the House of Representatives is grossly malapportioned, and that citizens of the state's larger communities are invidiously discriminated against be-

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House, majority control would have vested in representatives elected by only one-third of the State's population, and a House so constituted would not meet the standard set by the decision in *Reynolds* v. *Sims*, 32 U.S.L. Week, 4535 (U.S. June 15, 1964), U.S. , 84 S.Ct. 1362, for compliance with the Equal Protection Clause of the Fourteenth Amendment.

It is also of interest that the plaintiffs briefed their case on the proposition that the Equal Protection Clause prevents a state from having a system of unit representation by which one legislator represents more than twice as many constituents as another. In view of the "substantially equal" standard announced subsequently in *Reynolds* v. *Sims*, *supra*, this was a conservative position.

cause of the inequality of representation that results from the provision of the Vermont Constitution that gives each "inhabited" or organized town or city in the state one representative. The one representative from the Town of Stratton represents but 38 people, yet has an equal vote with the one representative elected by the 35,531 people of the City of Burlington. 132,790 persons, more than one-third of the total population of the state of 389,881 live in the cities of Burlington, Rutland, Barre, St. Albans, Montpelier and Winooski and the towns of Bennington, Brattleboro, Springfield and St. Johnsbury, which together have but a total of ten votes in a House of 246 members. When the population of twelve more municipalities, the City of Newport and the towns of Essex, South Burlington, Hartford, Rockingham, Middlebury, Colchester, Barre, Northfield, Windsor, Waterbury and Swanton, are added to the population of the ten municipalities just listed, one finds that in these 22 cities and towns more than one-half of the state's population, 195,692 people, reside—yet, far from having any comparable representation in the House they have but 22 of 246 representatives, or not quite 9 percent of the members of the House. These examples of invidious disparities could be multiplied by citing startling comparison after startling comparison, as, for instance, noting that the total population of the ten least populated towns is 661 souls and that of the ten heaviest populated cities and towns is 132,790, or that the 2,322 inhabitants of the 22 least populated towns have equal representation in the House with the 195,692 persons residing in the 22 heaviest populated municipalities whose inhabitants total more than one-half of the state's population. Voters in 82 towns containing less than 475 inhabitants per town elect 82 House members, or one-third of the membership of the House, although one-third of the total population elects only 10 members, and voters in 124 towns with less than 700 inhabitants per town and less than 12 percent of the state's population elect a majority of that membership while a majority of the people of the state, over 50 percent, elect but 22. And, too, Burlington's one representative represents more people than the 107 representatives from the 107 smallest towns, none of which has a population in excess of 600.

The Vermont Senate is composed of thirty members, no

more, no less, chosen on the basis of counties in proportion to their population, but with each county, irrespective of its population, guaranteed at least one of the thirty.

If the Senate were apportioned exactly according to the state's population of 389,881, each Senator would represent 12,996 persons, or 3[1] a percent of the state's population. The Vermont Senate, as of January 1962, ranked third among all the upper Houses of State Legislatures in representativeness (the percentage of the state's total population necessary to elect a majority of the members of the body), for a majority of the Senators represent 47 percent of the state's population. Even so, the Senate is malapportioned, for the one Senator from Grand Isle County represents but 2,927 persons, or [redacted] 1 percent of the state's people, whereas the one Senator fr[redacted]range County represents 16,014 people. Similarly, the one Senator from Essex County represents 6,083 people, or 1½ percent (.0156) of the population of the state. Under the state's Constitution, it is impossible to apportion the Senate in any way which will not result in at least a 5-1 disparity between the largest and the smallest number of people represented per Senator. Inasmuch as the disparity caused by the representation of the two counties of Grand Isle and Essex causes the inhabitants of the 12 other counties to be invidiously under-represented, it follows that the Senate is malapportioned despite its high national ranking for overall representativeness. See, on this point, however, as to the unlikely constitutionality of this representativeness, *Davis* v. *Mann*, 32 U.S.L. Week 4579 (U.S. June 15, 1964), 84 S.Ct. 1453, in which the Supreme Court held that a legislative apportionment plan of the State of Virginia under which 41.1 percent of the population can elect a majority of the Upper House and 45 percent of the population can elect a majority of the Lower House violates the Equal Protection Clause.

In view of the failure of the Legislature to vote to submit to the people proposed amendments to this State's organic law that would rectify these malapportionments, and the failure of the Legislature to take any permissible corrective legislative action, the plaintiffs had no other recourse except that of application to the courts. No initiative procedure is provided for under Vermont law. Therefore, we now turn

to a consideration of the effect of the "time-lock" provisions in Section 68 of the Vermont Constitution, *supra*, and we hold that it does not restrain this Court from ordering that the Vermont General Assembly be reapportioned or restrain action by officers of the State to set in motion machinery to do so by any other means that would not be discriminatory under the Federal Constitution. We hold here that the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution is being violated by the present apportionment and "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Reynolds* v. *Sims*, *supra*, at 4549, 84 S.Ct. 1362, 1393.

As we have stated earlier in this opinion, footnote 2, *supra*, plaintiffs have requested the Court that it not only declare that the present legislative apportionments violate the Equal Protection Clause but also restrain election officers from proceeding with General Assembly elections until reapportionment is accomplished, or order that the election of all 276 General Assemblymen be on a state-wide basis. At this point we should say and we find that defendant Virginia L'Eucyer is properly representative of all the County Clerks in the State and defendant Samuel A. Parsons is properly representative of all the Town and City Clerks in the State charged with election duties relative to the election of state legislators.

Should we adopt either of these alternatives we would act with great reluctance, for we realize that we would be acting in an area that is an unaccustomed one for judges. Moreover, we are very conscious of the well-known law-abiding characteristics of the independent people of Vermont, and of the justified reputation that the State and its people enjoy for integrity, responsibility, and fairness when a course of action is required to be followed. Therefore, although we declare that both Houses of the General Assembly are so apportioned that their composition violates the equal protection of the laws to all voters in a most fundamental way, in that substantially equal representation is denied to all voters in the State in the State's deliberative law-making Assembly, we are constrained to delay adopting any remedy until counsel have had an opportunity to appear before us once again with suggested orders for our issuance.

It is our opinion that a reasonable opportunity should be afforded the legislative and executive officials of the state prompty to initiate the means for the voters of the state to effect an equitable legislative apportionment without the necessity of further action by the court. As of now, we take the view that no progress has been made in this area since *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691. (1962), despite the palpable injustice of not making progress, because of an understandable desire to await decisions of the United States Supreme Court in the pending cases that were disposed of by that Court on June 15 and June 22, as well as the decision of this Court in this case, and because of a sense of frustration due to the "time lock" provision relative to the frequency within which amendments to the State Constitution could be initiated.

There is no excuse now for any further inaction. Within constitutional standards the people of the State should determine the framework and composition of the General Assembly, the number of its members, and the length of their terms of service, the qualifications for membership, the number, size and boundaries of electoral units, the number of legislators to be chosen from each unit—always having in mind that the seats in each house of a bicameral state legislature in order to meet the constitutional standard must be apportioned so as to provide substantially equal legislative representation for all citizens of all places within the state, and the weight of a citizen's vote cannot be made to depend on where he lives.

Accommodation by the people of Vermont to federal constitutional standards will require a reasonable space of time within which to work out the details of the proposals which will bring the Constitution of the State into conformity with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

To bring about this needed conformity the officers of the State, executive and legislative, are, of course, empowered to act. The overturning of the state's traditional reliance upon the election to the Lower House of the General Assembly of one Representative from each town in the State, each town as a town being an electoral unit, a traditional reliance which antedates the formation of our national Union and the admission of Vermont into it as the fourteenth state, as

well as the tradition of having at least one Senator represent each county, the county being an electoral unit, could be most difficult to accomplish. The transition should be easier than otherwise, however, in view of the fact that not only the Chief Executive and the Secretary of State are parties litigant, but, in addition, ten members of the House of Representatives, which House we have declared to be apportioned in violation of the United States Constitution, are also, at their own request, parties litigant. As such litigants these influential persons are of course subject to the decrees, orders, and mandates of this Court, and we apprehend that the cooperation which the court has received to date from all parties will continue.

We are aware that persons seeking nominations for the Senate or for the House of Representatives at the September primary elections must file their petitions on or before July 29; and we realize that, upon good cause shown, we should consider the proximity of a forthcoming election and the mechanics and complexities of the State's election laws; and that, even though we have found that this General Assembly is invalidly apportioned, we are permitted to act equitably and in accord with general equitable principles to avoid too much sudden disruption of the State's political way of life.

Accordingly we will receive suggestions for decretal orders at a hearing to be held at the U. S. Court House in Brattleboro, Vermont, on the 22nd day of July at 10:30 A.M., and we shall expect counsel to propose and to consider appropriate decrees to execute the decision we have made, and unless the defendants and defendant intervenors choose to default in their duty to proceed with dispatch to correct the present malapportionments we shall expect from them the submission of a plan of action, with a suggested time-table for the plan's execution.

The foregoing opinion contains our findings of fact and conclusions of law, but we shall entertain suggestions for further findings, if counsel care to request any, at the hearing on July 22.

Irrespective of what may be accomplished on July 22, we shall retain jurisdiction of the case, and we point out to counsel and those they represent that, as the Supreme Court of Vermont stated so well in *Mikell* v. *Rousseau*, *supra*, at 123

Vt. 139, 149: "This is not a time for ingenuity, it is a time to be fair."

STERRY R. WATERMAN,
U. S. Circuit Judge
J. JOSEPH SMITH,
U. S. Circuit Judge
ROBERT P. ANDERSON,
U. S. District Judge

Appendix "B"

UNITED STATES DISTRICT COURT
for the
DISTRICT OF VERMONT

Civil Action No. 3653

T. GARRY BUCKLEY, JANETTE N. BERRY, and JAMES E. FITZPATRICK,

Plaintiffs

vs.

PHILIP H. HOFF, Governor of Vermont; HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont; SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton; VIRGINIA L'ECUYER, as County Clerk for the County of Grand Isle,

Defendants

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Defendants-Intervenors

HARLEY WALTER KIDDER; VERMONT LEAGUE OF WOMEN VOTERS,

Amici Curiae

JUDGMENT

This cause having been heard October 29-30, 1963 on its merits; and the Court having filed an opinion July 10, 1964 embodying findings of fact and conclusions of law; and

The cause having been further heard July 22, 1964 on the judgment to be entered; it is

ORDERED, ADJUDGED AND DECREED:

(1) Chapter II, Section 18 of the Constitution of Vermont, which provides that the thirty Senators who compose

the Vermont Senate shall be apportioned among the several counties of the State so that each county, irrespective of variances in the population of the counties, shall have at least one Senator, is in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution and is declared to be unconstitutional and void, and

(2) Chapter II, Section 13 of the Constitution of Vermont, which provides that, irrespective of any variances in the population of the towns, each inhabited town in the State may elect one Representative to the House of Representatives, is in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution and is declared to be unconstitutional and void, and

(3) Therefore, subject to the provisions hereinafter appearing, the injunction that plaintiffs have requested restraining the officers of the State and those of the counties, towns and cities charged with the conduct of the elections of members of the General Assembly from proceeding with elections pursuant to the present method of apportionment is granted; and the defendants Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, the Town Clerks of the Towns of Vermont, and the County Clerks of the Counties of Vermont, and their respective successors in office, are perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to said method, and said defendants are further enjoined from certifying or in any other manner declaring that the results of such nominations or elections are valid or that the General Assembly of the State of Vermont which, if constitutionally elected, would be convened on January 11, 1965, is properly or legally constituted, unless by some other authorized lawful and constitutional method Senators and Representatives are nominated and elected to the Senate and House of Representatives of the State of Vermont pursuant to a reapportionment or redistricting of the Senate and a reapportionment or redistricting of the House of Representatives to be effected promptly, such reapportionment or redistricting of the Senate and reapportionment or redistricting of the House of

Representatives having been done in such manner as to achieve substantially equal weighting of the votes of all voters in the choice of members of the General Assembly as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 11, 1965, provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redistricting, and that the terms of said members shall expire on March 31, 1965.

(4) No action is taken now upon the alternative request of plaintiffs that this court order that elections of Senators and Representatives be on a state-wide basis; and jurisdiction is retained for the entry of such further orders as may be necessary and proper hereafter.

STERRY R. WATERMAN,
United States Circuit Judge
J. JOSEPH SMITH,
United States Circuit Judge
ROBERT P. ANDERSON,
United States District Judge

August 3, 1964

Supreme Court, U.S.
FILED
JAN 2 1965
JOHN F. DAVIS, CLERK

In the

Supreme Court of The United States

October Term, 1964

No. 624

SAMUEL A. PARSONS, LEROY E. LAWRENCE, ERMA PUFFER, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Appellants

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES E. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR APPELLANTS, SAMUEL A. PARSONS, ET AL

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OPINION BELOW

The opinion of the Three-Judge Federal District Court for the District of Vermont, 234 F. Supp. 2d 191 (1964), is set forth in the Record (R. 47). The Judgment of the Three-Judge Court is set forth in the Record (R. 108).

JURISDICTION

This action was instituted by the Appellees in the United States District Court for the District of Vermont wherein they alleged that the cause arose under the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C., §1983, 42 U.S.C., §1988, 28 U.S.C., §1343 and 28 U.S.C., §2201. Appellees claimed that they were denied the right of equal suffrage, equal protection of the laws and due process of law by virtue of the malapportionment of the bicameral General Assembly (legislature) of the State of Vermont.

The Court filed its opinion July 10, 1964 with the Clerk of the District Court for Vermont, wherein it decided that the apportionment of the Vermont General Assembly was in violation of the Fourteenth Amendment to the United States Constitution. The Judgment Order of the Court was filed August 3, 1964. Notice of Appeal was filed by Appellant MacBride August 29, 1964 and by the other Appellants September 2, 1964. The Appeal was entered and docketed with the Clerk of the Supreme Court of the United States October 26, 1964. Probable jurisdiction was noted by the Supreme Court of the United States December 14, 1964.

Jurisdiction to review a judgment of a Three-Judge District Court is conferred on this Court by 28 U.S.C. §1253.

CONSTITUTIONS AND STATUTES INVOLVED

ARTICLE XIV, United States Constitution

§ 1. Citizens; privileges and immunities; due process; equal protection

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER II, Vermont Constitution

§ 13. **Town representation; vacancies**

SECTION 13. In order that the freeman of the state may enjoy the benefit of election as equally as may be, each inhabited town in this state may, forever hereafter, hold elections therein and choose each one representative to represent them in the House of Representatives. Provided, however, that the General Assembly shall have the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise.

CHAPTER II, Vermont Constitution

§ 18. **Senators; number; qualification; apportionment**

SECTION 18. The Senate shall be composed of thirty Senators, to be of the freemen of the county for which they are elected, respectively, who shall have attained the age of thirty years, and they shall be elected biennially by the freemen of each county respectively.

The Senators shall be apportioned to the several counties, according to the population, as ascertained by the census taken under the authority of Congress in the year 1910, regard being always had, in such apportionment, to the counties having the largest fraction, and each county being given at least one Senator. The Legislature shall make a new apportionment of the Senators to the several counties, after the taking of each census of the United States, or after a census taken for the purpose of such apportionment, under the authority of this State, always regarding the above provisions of this section.

CHAPTER II, Vermont Constitution

§ 38. **Term of senators and representatives**

SECTION 38. The term of office of Senators and Town Representatives shall be two years, commencing on the first Wednesday next after the first Monday of January following their election.

28 U.S.C., § 1343

§ 1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C., § 2201

§ 2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal

relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C., § 1983

§ 1983. **Civil Action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., § 1988

§ 1988. **Proceeding in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Was it properly within the power of the District Court to limit the legislation to be proposed, considered and passed or rejected by the General Assembly of the State of Vermont scheduled to convene on January 6, 1965, to the devising of a constitutional method of reapportionment and redistricting or a revision of apportionment of both Houses of the General Assembly; or was this provision in the Court's Order, Paragraph (3), an abuse of the equity powers of said Court?

(2) Was it within the power of the District Court to decree that the terms of the members of the General Assembly scheduled to convene on January 6, 1965 shall expire on March 31, 1965; or was this provision of the Court's Order, Paragraph (3), an abuse of the equity powers of said Court?

STATEMENT OF THE CASE

By Plaintiffs' Amended Complaint filed April 23, 1963, Appellees, residents, voters and taxpayers of Vermont, prayed that a Three-Judge Court be appointed and that that Court enjoin the Governor of the State of Vermont, the Secretary of State of Vermont, the Town Clerks of the Towns of Vermont and the County Clerks of the Counties of Vermont from engaging in any general election duties as granted them by the laws and the Constitution of the State of Vermont. Among other things, Appellees asked that the Three-Judge Court declare that Section 13 and Section 18 of Chapter II of the Constitution of the State of Vermont, relating to apportionment of the House and Senate be declared unconstitutional. A group of legislators were granted permission to intervene, as Defendant-Intervenors.

Hearing was held on the merits of the Plaintiffs' Amended Complaint on October 29-30, 1963, and on July 10, 1964, the Opinion of the Court containing its findings of fact and conclusions of law was filed. In that Opinion the Court asked that counsel for the parties prepare suggestions for decretal orders. At a hearing before the Three-Judge Court on July 22, 1964, at Brattleboro, Vermont, various suggestions were presented by counsel. On August 3, 1964, the three-judge

Court rendered its Judgment wherein it held that Sections 13 and 18 of Chapter II of the Constitution of the State of Vermont were unconstitutional. The Court further perpetually enjoined the Governor of Vermont, the Secretary of State of Vermont, the Town Clerks of the Towns of Vermont, the County Clerks of the Counties of Vermont, and their respective successors in office from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to the declared unconstitutional provisions of the Constitution of the State of Vermont. The Court did permit the election then in process to continue, but ordered that the legislators elected to take office January 6, 1965, (inadvertently referred to as January 11, 1965) were to consider only legislation limited to the devising of a constitutional method of reapportionment and redistricting. The Court further held that the terms of the members of both houses which would commence on January 6, 1965, would expire March 31, 1965, notwithstanding that the constitutional term of office is for each member two years.

Members of the General Assembly were elected November 3, 1964 and will take office January 6, 1965, the terms of the members of the 1963 General Assembly having terminated January 5, 1965.

SUMMARY OF ARGUMENT

Appellants submit that Paragraph 3 of the District Court's Order prohibiting usu[illegible] legislative enactments by the 1965 General Assembly, and [illegible]niting the terms of the 1965 Legislators to less than three months, is an abuse of discretion by the Trial Court. The Vermont legislature must be empowered to act during 1965 to consider and enact ordinary legislation, to appropriate and raise money for the operation of State Government after June 30, 1965, and to meet any emergencies that may arise in 1965 requiring legislative action. Vermont needs a minimum of one year's time from January 1, 1965 within which to reapportion its legislature and to elect a new legislature according to the mandate of the Supreme Court of the United States.

ARGUMENT

A. *The Three Judge District Court Abused Its Discretion in Limiting the Legislative Powers of the 1965 Vermont Legislature*

The only portion of the Court's Judgment Order of August 3, 1964, in issue in this appeal are the following lines from the last part of Paragraph (3) of the Order:

> It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 11, 1965 *provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redistricting, and that the terms of said members shall expire on March 31, 1965.* [Emphasis added.] (R. 110.)

Appellants concede as a general rule of law that the order of a Three Judge Court granting or denying injunctive relief will not be disturbed on appeal in the absence of a compelling indication that the Court abused its discretion. Appellants

submit that the Court did abuse its discretion in limiting the 1965 Legislature of Vermont to enacting legislation only relating to reapportioning itself.

The Vermont General Assembly meets biennially each odd numbered year. Its members are elected for a term of two years as provided by Chapter II, Sec. 38 of the Vermont Constitution. The Senate is composed of thirty Senators, apportioned to the fourteen counties, according to population, with each county entitled to at least one Senator.[1] The House of Representatives is composed of 246 Representatives with each town and city entitled to one representative.[2]

The House of Representatives of the Vermont General Assembly has always been apportioned according to the provisions of the Vermont Constitution. The Senate is presently apportioned, as interpreted by the Vermont Supreme Court, as provided by the Vermont Constitution.

Mikell v. *Rousseau*,
123 Vt. 139, 183 A. 2d 817 (1962).[3]

At the time of the Opinion of the Three Judge Court, August 3, 1964, the Vermont Legislature was not in session. It had held its regular session in 1963 and had held a special session in the early part of 1964. Since August 3, 1964, no further session of the legislature has been held.

Hence, the Vermont General Assembly has not had an opportunity to consider reapportionment since the Court's decision in this case or since the decision in *Reynolds* v. *Sims*, 377 U. S. 533, 12 L ed 2d 506 (1964) and the related opinions in the other reapportionment cases decided June 15, 1964.

---

1. Vermont Constitution
   Chapter II, Sec. 18
2. Vermont Constitution
   Chapter II, Sec. 13
3. The Vermont Senate had been reapportioned regularly after each Federal census until the General Assembly failed to do so in 1951. As a result of the decision in *Mikell* v. *Rousseau*, the Vermont Senate was apportioned by the General Assembly according to the terms of the Vermont Constitution.

Appellants submit that a legislature even though malapportioned is still a legislature entitled to act as a legislature for a reasonable period of time. In his concurring opinion in *Baker* v. *Carr*, 369 U. S. 186, 7 L ed 2d 663, 705 (1962), Mr. Justice Douglas by footnote indicated:

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is none the less a legislature empowered to act (*Cedar Rapids* v. *Cox*, 252 Iowa 948, 964, 108 N. W. 2d 253, 262, 263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 SW 2d 40) is plainly correct."

Further, in the six reapportionment cases decided by this Court June 15, 1964, it was indicated there would be an interim period during which malapportioned legislatures would be permitted to continue to function as legislatures. In *Maryland Committee* v. *Tawes*, 377 U. S. 656, 675, 12 L ed 2d 595 (1964) this Court approved a two year period within which the Maryland legislature could be reapportioned. In *Davis* v. *Mann*, 377 U. S. 678, 692, 12 L ed 2d 609 (1964) a period of 1½ years within which to reapportion was approved.

As Mr. Justice Douglas stated in *Baker* v. *Carr*, p. 705 of 7 L ed 2d,

> "*** any relief accorded can be fashioned in the light of well-known principles of equity."

What is equitable for Vermont under the circumstances?

Appellants respectfully submit that Vermont should have at least one year from January 1, 1965 within which to reapportion and to elect a new legislature. In the meantime, the General Assembly should be permitted to function and carry out its ordinary functions as a legislature.

Equitable considerations require that the Vermont legislature be permitted to function with its usual powers during 1965. Plans for reapportionment are now being considered by a special legislative committee, by a special committee appointed by the Government and by other interested citizens in Vermont. Each plan provides for legislative districts in an attempt to comply with the decisions of this Court. Bills will be introduced early in the 1965 Session of the General

Assembly to reapportion. Yet, thorough consideration of the proposed bills will take a reasonable period of time. In the meantime, ordinary legislation will have to be enacted.

For example,

(1) Cities in Vermont receive power from the State through Charters enacted by the legislature. New city taxes or increase in city tax rates above that permitted by the Charter must receive the legislature's approval. Several cities require such changes now. Unless the City of Burlington can raise additional monies for its school system through new taxes or higher tax rates in 1965, its schools will suffer. An amendment to the Burlington City Charter by the Vermont General Assembly to provide the necessary tax revenue, should be enacted early in 1965. Other cities in Vermont have similar problems, relating to current income and school construction.

(2) The Vermont State Court System is in need of revision. A bill to enact proposed changes is ready for introduction in the Legislature.

(3) Money has been appropriated for the operation of State Government through June 30, 1965. Unless the General Assembly can consider an appropriation bill and can enact legislation to appropriate monies from July 1, 1965 for a reasonable period of time the State will have no money to pay its employees after June 30, 1965. It will have no money for welfare assistance, no money for State Police protection, no money for school aid to school districts, no money for school construction, no money for State officials and judges, no money for highway maintenance and construction, and no money to insure its property. There could be complete chaos in Vermont State Government after July 1, 1965, unless the Legislature can act in 1965.

(4) Further, additional legislation may be required to raise revenue for the operation of State Government, assuming an appropriation bill can be enacted.

(5) Also, the State needs a legislature to function to meet emergency needs of State Government as well as ordinary needs of State departments, which needs are real and should be met by new legislation although such needs should not be described as emergency needs.

However, in the event of emergency caused by war, or floods or other natural causes, it is essential that there be a legislature that would be empowered to act until a new apportionment can be enacted and a new legislature selected.

A reasonable time within which to consider reapportionment bills and passage would appear to Appellants to be six months, if the apportionment is done by the General Assembly. If done by a Constitutional Convention called by the Governor after enabling legislation of the General Assembly, the time schedule would be longer. Yet, it would seem such could be accomplished by either method so that a primary could be held and general elections held in late Fall of 1965 in order to have a new General Assembly available to serve commencing in January, 1966.

In *Reynolds* v. *Sims*, p. 8, *supra*, this Court stated:

> ". . . . . With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirement of the Court's Decree."

Here, the compelling equities are stronger than in the Reynolds case, in that the State of Vermont will have a legislature in power, but one that can not act to carry on ordinary legislative functions. The Court's Decree is an extreme embarrassment to the State and one that, we submit, is entirely unreasonable and inequitable.

B. *The Three Judge District Court Abused its Discretion in Limiting the Term of Office of the Members of the 1965 General Assembly*

By Paragraph 3 of the District Court's Decree the term of office of the members of the 1965 General Assembly ends March 31, 1965. The Court has in effect ruled that the legislature, which meets January 6, 1965, must organize itself, consider reapportionment bills and reapportion itself within a period of less than three months. Thereafter, a new legislature must be elected, presumably after a primary and general election; and thereafter will take office before June 30, 1965 to enact an appropriation bill and such additional tax

laws as may be necessary to raise the funds for the orderly operation of the State of Vermont government after June 30, 1965.

Appellants submit that this stringent time schedule is unreasonable and inequitable and is contrary to the intent of the decisions of this Court of June 15, 1964.

Further, since it is probable that a new legislature can not be elected and functioning as a legislature in Vermont by April 1, 1965, the State will be without a legislature empowered to act in emergencies after March 31, 1965. Appellants do not believe this Court intended by any of its reapportionment decisions to cause this result. The language of the Court in each decision suggests that reasonable time be permitted within which the legislature might heed the constitutional mandate to reapportion.

Maryland Committee v. *Tawes*, p. 9 *supra*.

Vermont, through its legislature, will reapportion within a timely period, if this Court permits it to do so.

The apportionment of each house of the General Assembly of Vermont will greatly affect all citizens of Vermont in many ways. The reapportionment must be the result of intelligent and mature thinking if the result is to be practical and non violative of the dictates of this Court and the Constitution of the United States. It is imperative that the 246 member House and the 30 member Senate not be hurried or forced into hasty action if justice and equity are to be components of the reapportionment plan finally adopted.

Here the relief granted by the District Court's Order was broader than the relief requested by the Appellees. (R. 108.)

Appellants submit the Court Order was in error and was an abuse of discretion by the District Court.

CONCLUSION

Appellants respectfully submit that the Three Judge District Court's Order should be reversed and that the Mandate instruct the Court to enter its order permitting the State of Vermont to (1) reapportion its legislature and elect a new General Assembly to take office on or before the first Wednesday after the first Monday in January, 1966;

(2) permit the 1965 General Assembly to remain in office and to enact all legislation necessary or desirable until its successor is elected and qualified to sit.

Respectfully submitted,

December 30, 1964

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No. 625

In The

Supreme Court of The United States

October Term, 1964

PHILIP H. HOFF, Governor of Vermont and HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont,

Appellants

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES F. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANTS, HOFF AND ARMSTRONG

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OPINION BELOW

The Opinion and Judgment of the three-judge District Court, District of Vermont, (R. p. 46-61, 108-110) is reported in 234 F. Supp. 191.

JURISDICTION

This suit was brought under the authority of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1983, 42 U.S.C. 1988, 28 U.S.C. 1343 and 28 U.S.C. 2201. The Appellees allege that they are denied the equal protection of the laws and due process of law guaranteed them under the Fourteenth Amendment to the Constitution of the United States because of the malapportionment of the Vermont Legislature. A three-judge District Court was assembled and the Court rendered an Opinion on July 10, 1964, holding that the apportionment of the Vermont General Assembly was in violation of the Fourteenth Amendment. The Judgment of the District Court was rendered on August 3, 1964. Notices of Appeal were filed by Intervenor, Roger L. MacBride, on August 29, 1964, by Defendant Samuel A. Parsons and the remaining intervenors on September 1, 1964, and by Defendants Philip H. Hoff, Governor, and Howard E. Armstrong, Secretary of State, on September 3, 1964. Jurisdiction to review a judgment of a three-judge District Court is conferred on this Court by 28 U.S.C. 1253.

CONSTITUTIONS AND STATUTES INVOLVED

ARTICLE XIV, United States Constitution

[§1. **Citizens; privileges and immunities; due process; equal protection**]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER II, Vermont Constitution

[§38. **Term of senators and representatives**]

SECTION 38. The term of office of Senators and Town Representatives shall be two years, commencing on the first Wednesday next after the first Monday of January following their election.

28 U.S.C., Chapter 85, §1343

§1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C., Chapter 151, §2201

§2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C., Chapter 21, §1983

§1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., Chapter 21, §1988

§1988. **Proceedings in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

QUESTIONS PRESENTED

1. Did the Court abuse its discretion in prohibiting the General Assembly from enacting legislation providing for the normal operation of state and municipal government pending a satisfactory reapportionment of the General Assembly in accordance with the order of the Court?

2. Did the Court abuse its discretion in limiting the term of office of members to the 1965 General Assembly to March 31, 1965?

STATEMENT

On January 22, 1963, the original Plaintiffs, T. Garry Buckley and Janette N. Lerry, filed their complaint challenging the apportionment of the General Assembly of the State of Vermont. Suit was commenced against the Governor, Lieutenant Governor, Speaker of the House and the Chairman of the Legislative Apportionment Committee. A three-judge District Court was assembled and the Court held a hearing on April 2, 1964, in order to determine Defendants' motion to dismiss. The Court ordered the complaint dismissed as to the Lieutenant Governor, the Speaker of the House and the Chairman of the Legislative Apportionment Committee. The Court further granted Appellees' motion to amend its complaint by adding Milton L. Hard as a party-plaintiff and Samuel A. Parsons, a town clerk, and Virginia B. L'Ecuyer, a county clerk, as party-defendants. James E. Fitzpatrick was later substituted for Milton L. Hard as a party-plaintiff. Leroy E. Lawrence, Erma Puffer, Samuel A. Parsons, Austin T. Foster, Lawrence Franklin, John D. Masterton, Russell Holmes, Stoyan Christowe, Cornelius Granai and Roger L. MacBride were allowed to intervene as defendants. Harley Walter Kidder and the Vermont League of Women Voters were allowed to submit briefs as *amici curiae*.

The Appellees, in behalf of themselves and other voters similarly situated, sought a declaratory judgment that their constitutional rights were impaired by the present apportionment of the Vermont General Assembly. They further sought to enjoin the governor, secretary of state, a county clerk and a town clerk from engaging in any general election duties or holding elections for the General Assembly until a reapportionment shall have been effected in accordance with the Fourteenth Amendment, or, in the alternative, that elections to the General Assembly be held at large.

On October 29 and 30, 1963, a hearing was held on the merits of the amended complaint. On July 10, 1964, the Court filed with the District Clerk for the District of Vermont an opinion in which it held that the Fourteenth Amendment to the Federal Constitution is being violated by the present apportionment of the Vermont General Assembly. On July 22, 1964, a hearing was held by the Court in order

to determine what orders should be included in the judgment.

On August 3, 1964, the Court issued its judgment order. Under the terms of said order, the defendants were "perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont" unless senators and representatives were elected by some constitutional method. The Court did allow the September primary and November general election to be conducted as presently scheduled but prohibited those elected from enacting any legislation other than devising a constitutional method of apportionment. The Court further ordered that the terms of the members of the General Assembly elected in November of 1964 for a term of two years should expire on March 31, 1965.

The special session of the 1963 General Assembly took final adjournment on March 13, 1963, and has not been in session since that date. The terms of those legislators will expire on January 5, 1965, and the terms of the 1965 legislators will commence on January 6, 1965, said date being the beginning of the 1965 regular session.

ARGUMENT

I

THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING THE GENERAL ASSEMBLY FROM ENACTING LEGISLATION PROVIDING FOR THE NORMAL OPERATION OF STATE AND MUNICIPAL GOVERNMENT PENDING A SATISFACTORY REAPPORTIONMENT OF THE GENERAL ASSEMBLY IN ACCORDANCE WITH THE ORDER OF THE COURT

A. *The Court Should Find an Abuse of Discretion on the Part of a District Court When the Action of Said Court in Enjoining the Passage of Legislation is Contrary to Equitable Principles and Improvident*

It is recognized as a general principle that action of a three-judge District Court in granting an injunction will not be disturbed on appeal in the absence of showing an abuse of discretion. *U. S. v. Corrick* (1936), 298 U.S. 435, 80 L.Ed. 1263, 56 S.Ct. 829. The Appellants submit that the present

case involves an abuse of discretion of a most clear and unmistakable nature.

The test in determining whether or not a lower court has abused its discretion in the granting or denying of an injunction has been established. This Court has indicated that a decision pertaining to an interlocutory injunction will not be reversed unless its action is contrary to some rule of equity or improvident.

> "A decree of the district court denying an interlocutory injunction will not be reversed unless shown to be contrary to some rule of equity or the result of an improvident exercise of judicial discretion."
>
> *National Fire Insurance Company* v. *Thompson* (1930), 281 U.S. 331, 338; 74 L.Ed. 881, 887; 50 S.Ct. 326, —.

In the case of *Home Owners' Loan Corporation* v. *Huffman* (1943), 134 F.2d 314, it was held:

> "Where an appellate court has power to review the exercise of judicial discretion, the inquiry is confined to whether the situation and the circumstances clearly show an abuse of discretion, that is, arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances."
>
> *Home Owners' Loan Corporation* v. *Huffman*, 134 F.2d 314, 317.

An abuse of discretion is shown where a court fails to properly apply the law to conceded or undisputed facts *Clemons* v. *Board of Education of Hillsboro* (1956), 228 F.2d 853, involved a case where the District Court refused to enjoin a school board from enforcing a policy of racial segregation. In holding that the District Court had abused its discretion, it was held:

> "It follows that the judgment of the District Court is contrary to the rules of equity and constitutes an improvident exercise of judicial power. It is generally held that the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. *Union Tool Co.* v.

Wilson, 259 U.S. 107, 112, 42 S.Ct. 427, 66 L.Ed. 848. Misapplication of the law to the facts is in itself an abuse of discretion. * * * Such abuse of discretion requires reversal."

Clemons v. *Board of Education of Hillsboro*, 228 F.2d 853, 857.

Under the provisions of 42 U.S.C. 1988, dealing with proceedings in vindication of civil rights, the common law, as modified by state statutes in the state wherein the court having jurisdiction of the matter is held, may be used to furnish suitable remedies. In *Hubbard* v. *Hubbard* (1904), 77 Vt. 73, 58 A. 969, the Vermont Supreme Court held that judicial discretion may be exercised only within the bounds of reason:

"It is the essence of all law that when the facts are the same the result is the same. It is always necessary in the decision of a matter in court that the judge should have in mind first a rule or standard, and second the facts which are to be tested thereby. But certain matters seem hardly to admit of the formulation of inflexible rules in advance and to be most wisely left to the sound judgment of the magistrate when the exigency shall arise, leaving him to be governed by the general analogies of the law and his own sense of justice. The better view seems to be that even in these instances he is not all together a law unto himself, but may be overruled if his action is such as to shock the universal, or the common, sense of what is right among his fellows. *All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and to be abused when it plainly overpasses these bounds.*" (Emphasis added.)

Hubbard v. *Hubbard*, 77 Vt. 73, 77; 58 A. 969, 970.

It has been held that irreparable harm should be construed by a court in the granting or denying of an injunction. Failure to consider this factor can be enough to show abuse of discretion.

This Court has held that the issue of irreparable harm should be of prime importance in determining whether or not an interlocutory injunction should be granted.

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, * * * the injunction usually will be granted."
>
> *Ohio Oil Co.* v. *Conway* (1929), 279 U.S. 813, 815; 73 L.Ed. 972, 973; 49 S.Ct. 256, —.

In *Drew* v. *Scranton* (1963), 229 F. Supp. 308, a three-judge District Court refused to enjoin the legislature from acting upon reapportionment bills which, as drafted, raised serious questions of constitutional validity. The Court said:

> "* * * we are satisfied that in the exercise of a sound discretion we should not attempt, upon this application for a temporary injunction, to pass upon the constitutional validity of the pending reapportionment bills upon the assumption that they will be enacted in their present form or that we should enjoin the Legislature from further consideration of them. In this connection we note that no showing of irreparable injury has been made."
>
> *Drew* v. *Scranton*, 229 F. Supp. 308, 310.

In the case at bar, the District Court went beyond the mere enjoining of action upon reapportionment bills which may not be constitutional and enjoined the legislature from enacting any laws which are necessary for the continued operation of state government. The Appellees failed to show that irreparable harm would result from the enactment of laws in the normal operation of state government. Irreparable harm is caused to Appellants and the State by the refusal to allow the enactment of such laws.

B. *Under the Facts of this Case, the Action Taken by the District Court in Enjoining the Vermont General Assembly from Enacting Legislation other than Reapportionment was Clearly Inequitable and Improvident*

The House of Representatives of the Vermont General Assembly is and always has been apportioned in accordance with the terms of the Vermont Constitution. The Senate of the Vermont General Assembly is apportioned in accordance with the Vermont Constitution as interpreted by the Vermont Supreme Court. The Vermont General Assembly meets biennially each odd numbered year. The opinion of the three-judge Court filed on July 10, 1964, and the judgment dated August 3, 1964, were made after the 1963 General Assembly had adjourned. Thus, the Vermont General Assembly has never had an opportunity to review its legislative apportionment subsequent to the decision of the Court.

It is true that the Governor of the State could have called a special session of the 1963 General Assembly after August 3, 1964. The Governor, in the exercise of his judgment, did not do so. In making a determination of this nature, the Governor had to consider the likelihood of action by the General Assembly under the known facts which existed at that time. The United States Congress did not adjourn until October 3, 1964. Prior to adjournment of Congress, various bills and resolutions were introduced pertaining to the reapportionment issue. With that situation present, it is almost a certainty that no special session of the Vermont General Assembly would have enacted reapportionment legislation.

Prior to and after October 3, 1964, the State of Vermont was engaged in an extensive election campaign. The serious question of one's rights under the Fourteenth Amendment should not be subjected to being engulfed in party politics by way of a special session in the midst of an election campaign for Governor, Congress, and all State and local offices. In this particular election, the incumbent Lieutenant Governor, who presides over the Senate, was running for Governor against the incumbent Governor.

After the election of November 3, 1964, in which the members of the 1965 General Assembly were chosen, a special

session of the "lame duck" 1963 General Assembly could have been called. Shortly after the Court's judgment, a legislative reapportionment committee began to study various methods of reapportionment in order to comply with the Court's order. The Governor at the same time appointed another committee to study reapportionment. The legislative committee has not concluded its deliberations or filed a report. The Governor's committee did not complete its deliberations or file a report until December 11, 1964. Under these circumstances, it was unlikely that "lame duck" legislators, whose terms expire on January 5, 1965, would have had time to have enacted a reapportionment law which would comply with the Court's order.

Under all of the circumstances, it is probable that the Governor exercised the best of judgment in not calling the legislature into special session. However, this is not the issue. Even if it is assumed that the Governor exercised bad judgment, the fact still remains that the legislature has not had an opportunity to comply with the Court's order. To forbid the General Assembly to carry on the normal functions of state government while considering and enacting reapportionment legislation is most unjust and inequitable.

Under the Court decree, the 1965 General Assembly can enact no legislation other than reapportionment and must enact such law before its term expires on April 1, 1965. Under the present law, primary petitions must be filed not less than forty days prior to the primary election and the general election is held fifty-six days after the primary election. Under any reapportionment plan, it will become necessary for most candidates to campaign in strange districts covering a greater geographical area with a larger population. These facts alone would be reason enough for a longer period in which to campaign. If adequate consideration is given to the various plans for apportionment, as well as changes in the numerous statutes affecting elections, it is unlikely that the General Assembly can reapportion itself much before April 1, if it can be done by that time. If reapportionment legislation was enacted on April 1, 1965, under orderly election procedures and under the present law, the election could not be completed until July 5, 1965. As the decree forbids the enactment of legislation by the 1965 General

Assembly, and as appropriations have been made only until July 1, 1965, orderly operation of state government would be completely disrupted.

Some voters and members of the legislature have urged the calling of a constitutional convention by the General Assembly. There is no provision in the State Constitution which provides for a constitutional convention. If such legislation is enacted on the theory that the General Assembly has the inherent power to call such a convention, it might well be that a declaratory judgment petition would be instituted which would result in the Vermont Supreme Court passing upon the constitutionality of this procedure. Under these circumstances, it would be impossible to elect delegates to such a convention, have them act and have voter approval in time to have a new General Assembly meet and enact laws appropriating money for the operation of state government prior to July 1, 1965.

There are also matters besides appropriations which need immediate action by the General Assembly. Some local governments have school problems that can be solved only by a change in the state laws. It is anticipated that a change in the laws pertaining to the University of Vermont will be necessary so as to allow loans to college students. It is also anticipated that Congress will enact laws which will allow grants to Vermont if enabling legislation is passed by the Vermont General Assembly. Without such enabling acts, this money will be lost.

It has been argued that an injunction against the enactment of legislation is necessary so as to force the General Assembly to reapportion. There is no logic in this argument. First, it is only an assumption that the General Assembly will refuse to reapportion itself. There is more likely to be difficulty in enacting such legislation if the members feel that they are unjustly forbidden from enacting legislation to keep state government in operation for the benefit of the people. Second, and more important, the argument fails because reapportionment is not going to be prevented in any case. The Court has made it clear that the three-judge Courts shall reapportion a legislature which fails to act after being given a reasonable opportunity.

An injunction should be denied when the harm caused to Appellees by the denial will be inconsiderable and the harm caused to Appellants by the granting thereof will be grave. There is no question but that the Vermont General Assembly will be reapportioned so as to comply with the Equal Protection Clause of the Fourteenth Amendment. There is no dispute that the General Assembly has not had an opportunity to reapportion itself since the order of the Court. Nor is there any question but what the injunction against the passage of legislation in the usual manner will cause a disruption in the operation of state government. This can and will cause irreparable harm to the State. The disruption of state government by this means will gain the Appellees nothing. The harm to the Appellees in allowing the legislature to work on bills and enact laws will be inconsiderable or nonexistent. In fact, the injunction may well work against the best interests of the Appellees. If most of the members of the General Assembly are working in committees on other important state problems, a small legislative committee can work on the important matter of reapportionment. With the Court's injunction in force, there would be nothing for the 276 members of the General Assembly to do but work on reapportionment. Under these circumstances, a large number of that body would either have to sit around doing nothing or resolve themselves into a committee of the whole to work on reapportionment. The latter course is more than likely. There is a serious question as to whether an intelligent plan could be worked out with a committee of that size. Thus, Appellees' best interests will be better served by allowing the members of the General Assembly to engage in other duties while a workable plan is formulated by a small committee.

The Appellees did not request an injunction which would forbid the legislature from carrying on the normal processes of state government while reapportioning itself. In fact, Appellees' counsel joined with other counsel in approving the so-called Governor's Plan (R., p. 106-107) prior to the court hearing on July 22, 1964. At the beginning of the hearing on July 22, 1964, counsel for Appellees again approved the Governor's Plan, except for the times contained therein.

> "Mr. Crispe: May it please the Court, I believe the Court is aware from the newspaper accounts that

a meeting was held in the Governor's Chambers in Montpelier Friday night, where the attorneys for the various parties met for the purpose of endeavoring to reach an agreement as to a plan that would be presented to this Court. The lawyers in the case all agreed to the plan which was submitted to us by Governor Hoff. I might say, that certain corrections were made at that time, but in the final analysis, the parties, or the attorneys, did not, Your Honor, sign the stipulation at that time, because they wanted to submit the plan, or the stipulation, rather, to their respective clients for approval.

I might say, Your Honor, that basically; the plan of the Governor is agreeable to the petitioners, except, that the schedule of dates, as proposed in the Governor's Plan, seems to the petitioners, not, does not come within the opinion of this Court, nor, within the spirit of the language of Judge Warren—Chief Justice Warren—in the opinions rendered by him."

(R., p. 64).

The first mention of an injunction against the legislature from enacting laws to keep state government in operation came from a member of the 3-Judge Court:

"JUDGE WATERMAN: * * * assuming that we feel exactly the way you do, and I think we are on record more or less, in other cases, as to how we feel as individuals or as individual judges, other than as we have to feel now, as inferior judges, obeying our masters,—assuming we go along with you—just assuming,—and permit the elections to go along unchallenged, untrampled, and uneffected; * * * as the present Attorney General of this State, what do you have to say as to the legislation such an assembly might pass?

GENERAL GIBSON: I think there is a substantial body of law, Your Honor, that says that this type of legislation is valid and constitutional.

JUDGE WATERMAN: What would you say to our going along with you and saying that the first and only order of business of the 1965 General Assembly,

> so elected, shall be to submit to the people a reapportionment plan, and shall then recess and do no more business until that reapportionment plan is acted upon and approval of the Court is received?"
>
> (R., p. 75-76).

It thus becomes clear that Appellees did not suggest such a drastic injunction and made no showing of irreparable harm to them by failing to so enjoin the General Assembly. The idea originated from the Court, apparently due to the erroneous belief that the legislature would not have the power to act on such legislation.

Mr. Justice Douglas in *Baker* v. *Carr* (1962), 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, stated in a footnote that a malapportioned legislature had the power to act.

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is none-the-less a legislature empowered to act (*Cedar Rapids* v. *Cox* 252 Iowa 948, 964, 108 N.W. 2d 253, 262, 263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W.2d 40) is plainly correct."
>
> *Baker* v. *Carr*, 369 U.S. 186, 250; 7 L.Ed.2d 663, 705; 82 S.Ct. 691, ——.

The case of *Cedar Rapids* v. *Cox* (1961) 252 Iowa 948, 708 N.W.2d 253, which was cited with approval by Justice Douglas, indicated that the courts should prevent chaos from resulting in legislative reapportionment cases. To the same effect are *Dawson* v. *Bomar* (1963), 322 F.2d 445 and *Opinion to the Governor* (R. I., 1962), 185 A.2d 111. Chaos will certainly result if the legislature cannot pass laws to keep state government in normal operation.

C. *Under the Recent Decisions of This Court, the State Legislatures are Allowed an Opportunity to Reapportion and Judicial Relief is Appropriate only When the Legislature Fails To Comply With The Court's Order.*

Chief Justice Warren speaking for this Court in *Reynolds* v. *Sims* (1964), 32 L.W. 4535, 377 U.S. 533, 12 L.Ed 2d —, 84 S.Ct. 1362, commended the District Court in declining further action until the Alabama Legislature had been given an opportunity to act.

> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that Legislative reapportionment is primarily a matter for legislative consideration and determination, *and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.*" (Emphasis added).
>
> *Reynolds* v. *Sims*, 32 L.W. 4535, 4550; 377 U.S. 533, ——; 12 L.Ed.2d ——; 82 S. Ct. 1362, ——.

The District Court in the case at bar acted contrary to the clear language of the Chief Justice. The Court attempted on its own iniative to give judicial relief by enjoining the General Assembly from enacting laws before it had been given a timely opportunity to reapportion itself.

This Court in the *Maryland Committee for Fair Representation* v. *Tawes* (1964), 32 L.W. 4573, 377 U.S. 656, 12 L.Ed.2d ——, 84 S.Ct. 1429, indicated that the Maryland legislature had time to act before the next regular election and that the District Court need take no further action unless the legislature refused to comply with the order.

> "Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances, should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan."
>
> *Maryland Committee for Fair Representation* v. *Tawes*, 32 L.W. 4573, 4578; 377 U.S. 656, ——, 12 L.Ed.2d ——, 84 S.Ct. 1429, ——.

Mr. Justice Douglas in his concurring opinion in *Baker* v. *Carr* (1962), 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, stated that equity principles should apply.

> "The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity."
>
> *Baker* v. *Carr*, 369 U.S. 186, 250; 7 L.Ed.2d 663, 705, 82 S.Ct. 691, ——.

Under the well-known principles of equity, the Vermont General Assembly should be allowed to keep the government of Vermont in normal operation while considering and adopting a new apportionment plan which will have complied with the order of the Court. To forbid such normal operation would be contrary to any known principles of equity.

Mr. Justice Douglas further cited with approval the case of *Magraw* v. *Donovan* (1958), 163 F. Supp. 184, wherein the Court held:

> "* * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duties under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.' * * *

> It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meeting in January 1959 has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State."
>
> *Magraw* v. *Donovan*, 163 F. Supp. 184, 187, 188.

In the *Magraw* case, the Minnesota legislature had refused to redistrict in accordance with its own constitution from 1913 to 1958. In Vermont, on the other hand, the General Assembly is apportioned in accordance with its own constitution and was not knowingly in violation of the law until the decision of the District Court in this case. The Vermont General Assembly has been given no opportunity by the District Court to enact a new apportionment law and to continue the orderly processes of state government in the interim.

II

The Court Abused its Discretion in Limiting the Term of Office of Members to the 1965 General Assembly to March 31, 1965

The Court abused its discretion in allowing the legislature only three months to solve the complicated problem of reapportionment. The Appellants clearly recognize the careful balancing which must be done so as to protect Appellees' constitutional rights on the one hand and to avoid the complete breakdown of state government on the other hand. It is submitted that any time limit should be such so as to allow a special election of a reapportioned legislature in the Fall of 1965 so that its members would be ready to serve in January of 1966. It would be dangerous for the welfare of the State to allow the terms of members to the 1965 General Assembly to expire without reservation prior to the election of a new legislative body. Until a reapportioned legislature is ready to take office, some provision should be made for calling the presently elected members of the 1965 General Assembly into special session for purposes other than reapportionment. This

would assure the existence of legislative machinery to take care of any emergency, such as war. Without such a provision, the State could find itself in an impossible situation where there would be no General Assembly and no means of bringing one into existence between the time the General Assembly enacts reapportionment legislation and the time a reapportioned legislature takes office.

CONCLUSION

Most of our states have the same or similar problems relative to malapportioned legislatures. There is a wide variation between three-judge District Courts concerning their orders in such cases. The District Court in the case at bar, by enjoining legislative action other than reapportionment, appears to have made one of the most severe orders for this type of case. By this order, the District Court has abused its discretion as its action was inequitable and improvident.

Wherefore, Appellants pray that the Honorable Court hold that the District Court abused its discretion in enjoining the legislature from carrying on its normal business while considering and enacting a reapportionment statute which conforms with the Fourteenth Amendment. They further pray that the Honorable Court hold that the District Court abused its discretion in limiting the terms of office of the 1965 legislators to three months under the circumstances of this case. They further request that the Honorable Court approve a time schedule which will assure the re-election of a reapportioned legislature in the Fall of 1965 and to allow the normal operation of state government to continue in the interim.

Respectfully submitted,

CHARLES E. GIBSON, JR.,
Attorney General
CHESTER S. KETCHAM,
Deputy Attorney General

December 1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 624

SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton, *Appellant*

and

LEROY E. LAWRENCE, ERMA PUFFER, SAMUEL A. PARSONS, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MACBRIDE, *Appellants-Intervenors*

v.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES E. FITZPATRICK, *Appellees*

No. 625

PHILIP H. HOFF, Governor of Vermont, and HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont, *Appellants*

v.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES E. FITZPATRICK, *Appellees*

On Appeal From the United States District Court for the District of Vermont

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MOTION BY ALL THE PARTIES TO THIS CASE TO MODIFY THE ENFORCEMENT ORDER OF THE COURT BELOW AND TO AFFIRM AS MODIFIED

Now come Appellants, Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State of the State of Vermont, and Samuel A. Parsons, as Town Clerk of the Town of Hubbardton; Appellees,

T. Garry Buckley, Janette N. Berry, and James E. Fitzpatrick; Intervenors, Leroy E. Lawrence, Erma Puffer, Samuel A. Parsons, Austin T. Foster, Lawrence Franklin, John D. Masterton, Russell Holmes, Stoyan Christowe, Cornelius Granai and Roger L. MacBride; constituting all the parties to this cause, and respectfully move this Court to modify the District Court's enforcement order to conform to a stipulation signed by all the parties to this cause and the Intervenors, attached to this motion as Appendix A, and to affirm the judgment of the District Court as modified.

As grounds of this motion Appellants, Appellees and Intervenors respectfully represent that there is no contest on any issue of fact or law between them, and there is, therefore, no purpose in setting this case for argument.

The parties to this case are convinced that the enforcement of reapportionment according to the terms of the stipulation is in the public interest. We believe that the time limits set out in the stipulation will operate as speedily as is practicable in the State of Vermont. These issues have been argued at some length in the Jurisdictional Statements filed in this Court. They can be summed up by stating that the six reapportionment cases which were decided at the October 1963 Term gave every indication that this Court would first give the legislatures of the States an opportunity to apportion their bodies so as to comply with the Equal Protection Clause of the Fourteenth Amendment and to allow State governments to continue to operate in the interim. We submit that the plan contained in the stipulation adequately meets this test, comports with the spirit of the Court's substantive

decisions on reapportionment, and is in the public interest.

In addition to saving the time of this Court there are important reasons why this case should be decided immediately. The Vermont legislature convenes on January 6, 1965. The District Court's order enjoins all legislative action except reapportionment legislation. In addition, it shortens the terms of the present legislature so that they expire March 31, 1965, at which time a new election must be held and a new legislature must be elected and take office. This creates a feeling of confusion. There are, of course, members of the legislature who desire to resist reapportionment and who hope that the Court will on its own motion reverse the decision of the District Court on its merits. The parties to this cause recognize that the probability that this Court would on its own motion take such action is practically nonexistent. Nevertheless, the legal situation is not clearly understood by a large number of the legislators.

It is true that this Court has stayed the portions of the order of the District Court from which this appeal is taken and that as a matter of law the legislature can proceed with its business while this case is under advisement. But the possibility that this Court might affirm the injunction against legislative action other than reapportionment and the order cutting short the terms of the legislators creates an atmosphere of uncertainty which, even if this Court acts on this appeal with the utmost speed, will render the first month of the legislative session futile. It ordinarily takes about six months to pass an appropriations bill. There is a probability that in spite of the stay very little will be

done by the legislature until the oppressive provisions of the order from which we appeal are reversed.

We attach as Appendix B a more detailed statement of the reasons why these appeals should be summarily disposed of according to the stipulation.

Respectfully submitted,

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Attorney for Appellant Parsons and Appellants-Intervenors

Dated: January 4, 1965

APPENDIX A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 624

SAMUEL A. PARSONS, as Town Clerk of the Town of Hubbardton, *Appellant*

and

LEROY E. LAWRENCE, ET AL., *Appellants-Intervenors*

v.

T. GARRY BUCKLEY, ET AL., *Appellees*

No. 625

PHILIP H. HOFF, Governor of Vermont, et al., *Appellants*

v.

T. GARRY BUCKLEY, ET AL., *Appellees*

Stipulation

NOW COMES, Philip H. Hoff, Governor of the State of Vermont and Howard E. Armstrong, Secretary of State of the State of Vermont, Appellants, by and through their attorneys, Attorney General Charles E. Gibson, Jr. and Deputy Attorney General Chester S. Ketcham; Samuel A. Parsons, Appellant, by and through his attorney, Hilton A. Wick, Esq.; T. Garry Buckley, Janette N. Berry and James E. Fitzpatrick, Appellees, by and through their attorney, Richard Thomas, Esq.; and Leroy E. Lawrence, Erma Puffer, Samuel A. Parsons, Austin T. Foster, Law-

rence Franklin, John D. Masterson, Russell Holmes, Stoyan Christowe, Cornelius Granai and Roger L. MacBride, Appellant-Intervenors, by and through their attorney, Hilton A. Wick, Esq., being all the parties in said litigation, and STIPULATE that the United States Supreme Court be requested to modify the Judgment Order of the District Court dated August 3, 1964, as follows:

That Paragraph (3) of said Order be deleted and in lieu thereof the Order include the following:

1. Therefore, subject to the provisions hereinafter appearing, the injunction that plaintiffs have requested restraining the officers of the State and those of the counties, towns and cities charged with the conduct of the elections of members of the General Assembly from proceeding with elections pursuant to the present method of apportionment is granted; and the defendants Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, the Town Clerks of the Towns of Vermont, and the County Clerks of the Counties of Vermont, and their respective successors in office, are perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to said method, and said defendants are further enjoined from certifying or in any other manner declaring that the results of such nominations or elections are valid or that the General Assembly of the State of Vermont which, if constitutionally elected, would be convened on January 6, 1965, is properly or legally constituted, unless by some other authorized lawful and constitutional method Senators and Representatives are nominated and elected to the Senate and House of Representatives of the State of Vermont pursuant to a reapportionment or redistricting of the House of Representatives to be effected promptly, such reapportion-

ment or redistricting of the Senate and reapportionment or redistricting of the House of Representatives having been done in such manner as to achieve substantial equality in the choice of members of the General Assembly as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 6, 1965, provided that:

(a) A reapportionment bill or bills be introduced in at least one House of the General Assembly by February 1, 1965.

(b) Should the General Assembly desire to submit the matter of reapportionment to a constitutional convention, legislation shall be enacted on or before March 1, 1965 to provide for the convening of a constitutional convention on or before June 1, 1965.

(c) Should legislation be enacted setting up a constitutional convention, said convention shall finish its deliberations by September 1, 1965.

(d) If the matter of reapportionment is not referred to a constitutional convention, reapportionment legislation shall be enacted so as to comply with the mandate of the Court on or before July 1, 1965.

(e) The General Assembly shall be empowered to enact all legislation as usual for the operation of state, town and county governments between January 6, 1965 and July 1, 1965.

(f) If reapportionment legislation is not enacted by July 1, 1965, and if a constitutional convention shall fail to reapportion the General Assembly by September 1, 1965, the Court shall reapportion the General Assembly so as to comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(g) In any event, a reapportioned General Assembly shall have been elected and ready to serve by the first Wednesday after the first Monday in January, 1966.

(h) The terms of office of the members to the 1965 General Assembly shall expire on July 1, 1965, except that their offices may continue if called into special session by the Governor of the State of Vermont to act upon a State emergency not pertaining to reapportionment.

Dated this 26th day of December, 1964.

s/ CHARLES E. GIBSON, JR.
Charles E. Gibson, Jr.
Attorney General

s/ CHESTER S. KETCHAM
Chester S. Ketcham
Deputy Attorney Genreal

Attorneys for Appellants
Hoff and Armstrong

s/ RICHARD THOMAS
Richard Thomas, Esq.
Attorney for Appellees Buckley,
Berry and Fitzpatrick

s/ HILTON A. WICK
Hilton A. Wick, Esq.
Attorney for Appellant Parsons
and Appellants-Intervenors

APPENDIX B

1. The District Court, District of Vermont, issued a Judgment Order on August 3, 1964, wherein it enjoined the 1965 General Assembly from enacting any legislation other than reapportionment and limited the two-year terms of the members of the 1965 General Assembly to April 1, 1965.

2. The House of Representatives of the Vermont General Assembly is and always has been apportioned in accordance with the terms of the Vermont Constitution. The Senate of the Vermont General Assembly is apportioned in accordance with the Vermont Constitution as interpreted by the Vermont Supreme Court.

3. The 1963 General Assembly took final adjournment of its 1964 Special Session on March 13, 1964. At the time of said adjournment, the General Assembly was not knowingly apportioned in violation of the United States Constitution. The 1963 General Assembly has not been in session since that time and has not had an opportunity to comply with the mandate of the District Court.

4. A Legislative Reapportionment Commission commenced its deliberations on reapportionment plans immediately after the issuance of the District Court's order dated August 3, 1964. A Governor's Committee on Reapportionment also commenced its deliberations shortly after said date. Numerous reapportionment plans were studied by these groups throughout the late Summer and Fall. The legislative committee has not, as yet, prepared a final report but it plans to submit such a report to the 1965 General Assembly. The Governor's Committee did not submit a final report to the Governor until December 11, 1964.

5. The United States Congress did not take final adjournment until October 3, 1964, and prior to adjournment numerous bills and resolutions were introduced pertaining to the reapportionment issue.

6. During the Summer and Fall of 1964, the State of Vermont was engaged in an extensive election campaign

for Governor, Congress and all state and local offices. The calling of a special session of the 1963 General Assembly during this period would have subjected one's rights under the Fourteenth Amendment to becoming engulfed in partisan politics.

7. After November 3, 1964, it is unlikely that the "lame duck" 1963 General Assembly could have sufficiently considered and enacted a reapportionment plan, particularly when its own committee was still working on this serious question and was not in a position to submit a final report.

8. Under all of the circumstances, the Governor, in the exercise of his best judgment, did not call the 1963 General Assembly into special session. Whether this judgment was good or bad does not detract from the fact that the General Assembly has not had an opportunity to comply with the Court's Order and to continue the normal processes of state government in the interim.

9. Under the Court decree, the 1965 General Assembly must apportion by April 1, 1965. Under the present law, primary petitions must be filed not less than forty days prior to the primary election and the general election is held fifty-six days after the primary election. Under any reapportionment plan, it will become necessary for most candidates to campaign in new districts covering a greater geographical area with a larger population. This fact alone would be reason enough for a longer period in which to campaign. Under the present election laws, a reapportioned legislature could not be elected until April 12, 1965 at the earliest and July 5, 1965 at the latest. In order for the election to take place on April 12, it would be necessary for the 1965 General Assembly to enact reapportionment legislation on the first day of the session which commences on January 6, 1965. Such action is beyond the realm of possibility. It is most likely that careful deliberations by the 1965 General Assembly in studying various systems of

reapportionment will result in no special elections until July 5, 1965, or a date approaching said time.

10. The State fiscal year ends on June 30, 1965. No money has been appropriated for the operation of state government beyond that date and the 1965 General Assembly is prohibited from enacting such legislation under the order of the District Court. Without a modification of the order, it is likely that no appropriation act can be passed before the end of the fiscal year. This will result in a complete breakdown of state government. Without attempting to enumerate all the problems which will result in the absence of an appropriation act, some resulting hardships will include:

(a) No funds will be available to compensate state employees;

(b) No funds will be available to keep the state courts in operation;

(c) No funds will be available to match Federal funds in the construction of the interstate highway system;

(d) The Social Security Act requires that the Vermont Commissioner of Social Welfare certify that financial participation from Vermont is available before Federal funds can be granted to make payments for State Plans under the terms of said Act. Such certification cannot be made without an appropriation by the Vermont General Assembly. Presently, Federal and State funds amount to approximately $9,000,000.00 annually for these programs. After July 1, 1965, in absence of state appropriations the following programs would have no funds:

(1) Grants to the state for aid and services to needy families with children. Under this program some 5,300 persons receive monthly assistance for the basic necessities, i.e., food, clothing and shelter.

(2) Grants to the state for maternal and child welfare. Some 2,000 children are served under this sec-

tion of the Social Security Act either in the Department's Protective Services role or under the Department's Total Care and Custody program.

(3) Grants to the state for Aid to the Aged, Blind or Disabled, or for such aid and medical assistance for the aged. Grants are made for basic necessities, i.e., food, clothing and shelter and some medical care in all of these programs except Medical Assistance for the Aged. The latter program provides grants only for some necessary medical services. Monthly case loads for said programs are approximately as follows:

Old Age Assistance	5,400 persons
Aid to Blind	120 persons
Aid to Disabled	1,200 persons
Medical Assistance for the Aged	150 persons

(e) A continuation of the benefits under the Manpower Development and Training Act in Vermont will not be possible if no appropriation is made by the General Assembly for said program by July 1, 1965.

11. Under the present court injunction, no enabling legislation can be enacted so as to allow the State to participate in new Federal programs which require such legislation. Without attempting to enumerate all such programs, some include:

(a) Federal Food Stamp Act. This Act authorizes the United States Department of Agriculture to adopt a food stamp plan to provide low-income households more adequate nutritional diets. Under this program, stamps would be purchased by individuals through the State Social Welfare Department at a nominal cost and then exchanged at stores for more food than could be purchased by the money paid for the stamps. State legislation is needed in order to take advantage of this program.

(b) Day Care Licensing. The Federal program provides Federal funds on a matching basis with State funds for support of day care programs. This program provides means of insuring adequate care for children of working mothers. In order for Vermont to participate in this program, legislation is necessary to provide for the licensing of day care establishments.

(c) Aid to Families of Dependent Children. The last session of Congress authorized aid under this program for children up to age twenty-one so long as such child continued with a formal high school or vocational education. The prior Federal law limited these benefits to children eighteen years or under. Present Vermont law limits State participation in this program to children eighteen years or under. Further legislation is needed in order to gain the increased coverage provided by the change in the Federal law.

(d) The Vermont enabling legislation for Medical Assistance for the Aged expires on June 30, 1965. Further legislative action is needed before said date in order that this program may continue in Vermont.

(e) Amendment of State law pertaining to participation in the Higher Education Act so as to allow continuation of loans to students at the University of Vermont.

12. Under the present court injunction, no legislation can be enacted concerning the serious tax problems which face the State of Vermont. Without attempting to enumerate all such problems, some of them are:

(a) Examination of the general tax laws in light of the increased needs of state government.

(b) Examination of the percentage received by the State from parimutuel race tracks.

(c) Examination of the present state liquor monopoly and the taxes obtained thereunder.

13. Under the present court injunction, no legislation can be enacted concerning the urgent need for increased state personnel and the need for laws protecting the safety of the state's citizens. Without attempting to enumerate all of these problems, some include:

(a) Legislation to increase the staff of the Attorney General's office in order to perform the duties required by law. It is impossible for the Attorney General and the Deputy Attorney General, as the only trial lawyers in non-highway matters, to carry the workload which has been increased by the reapportionment suit, as well as other litigation matters.

(b) Legislation to increase personnel for the purposes of auditing state banks.

(c) Enactment of a law clarifying the payment to counsel in criminal cases. Further amendment of the law is needed in light of this Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), 9 L. Ed. 2d 799, 83 S. Ct. 792, particularly as it pertains to fugitive from justice cases.

(d) Enactment of laws to stem the increased highway death toll on Vermont highways which exceeded all previous records in 1964 and was one of the worst records in the country.

(e) Enactment of a law protecting the public from resale of parimutuel tickets by a syndicate at the parimutuel track.

14. Under the present court injunction, no legislation can be enacted to revise village and city charters. Without enumerating all of the problems in this area, some of them include:

(a) Enactment of legislation revising the City of Burlington charter. In 1964, the City of Burlington completed a new high school building. The present deficit in

the operation of the Burlington schools is approximately $100,000.00. It is anticipated that there will be a deficit of $500,000.00 for the next fiscal year. Under the present character, there is no way to enact new types of local taxes in order to operate the schools and the present charter prohibits borrowing for the operation of the schools. A charter provision provides that the office of school superintendent shall become vacant if more money is spent than was appropriated. Another charter provision provides that members of the school board shall become personally liable for payments made in the operation of the schools when such payments exceed the amount of money appropriated.

(b) Enactment of legislation revising the City of Barre charter. Urgent needs in the fields of zoning and urban renewal require such revision.

(c) It is anticipated that several village charters need revision so as to better provide for schools, zoning and urban renewal.

15. It is hoped and anticipated that this Court's stay of the District Court's order will allow time enough for the passage of some of this needed legislation. However, it is also anticipated that many other problems necessitating legislation will become known as the legislature begins its deliberations.

16. At least thirty-four states are involved with reapportionment problems.[1] In only three other cases have attempts been made to enjoin legislative action by representatives to the General Assembly. In Washington, such action was not taken until after the legislature had been given an opportunity to reapportion and failed to comply with the Court's order. In Georgia, an injunction against

[1] The Council of State Governments pamphlet entitled "Legislative Apportionment: A Summary of State Action, June 15, 1964 - November 1, 1964."

part of the legislative duties was modified by the District Court after this Court had noted probable jurisdiction. On July 23, 1964, the Connecticut District Court issued an order which enjoined legislative action. After a conference between the Governor of Connecticut and the District Court on July 29, 1964, this part of the order was deleted. Is is interesting to note that the Connecticut modification took place just five days prior to the order in the Vermont case enjoining legislative action even though two of the members of the Three-Judge Court in Connecticut are also members of the Three-Judge Court in Vermont.

17. In only four other cases have the terms of the members of the General Assembly been shortened. In no case have the terms been limited to less than three months as in the case at bar. The next most severe time limit is New York and Washington which allows the terms to continue for one year.

18. Considering all of the factors in this case, all of the parties to this litigation have stipulated to a modification of the order of the District Court. The Stipulation is incorporated as Appendix A to this Motion. Under the terms of this Stipulation, the General Assembly is allowed to keep state government in operation while reapportioning itself so as to meet the requirements of the Fourteenth Amendment.

Dated at Montpelier, Vermont, this 4th day of January, 1965.

STATE OF VERMONT

CHARLES E. GIBSON, JR.
Attorney General

By_____

CHESTER S. KETCHAM
Deputy Attorney General